

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

UNITED STATES OF AMERICA;
SOUTH CAROLINA DEPARTMENT OF
HEALTH AND ENVIRONMENTAL
CONTROL, AND SOUTH CAROLINA
DEPARTMENT OF NATURAL
RESOURCES, AS AGENCIES OF THE
STATE OF SOUTH CAROLINA AND
AS TRUSTEES FOR NATURAL
RESOURCES,

Plaintiffs,

v.

BEAZER EAST, INC.,

Defendant.

CIVIL NO. 2:18-cv-3051-DCN

CONSENT DECREE

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I. BACKGROUND

A. The United States of America, on behalf of the United States Department of the Interior (“DOI”) and the National Oceanic and Atmospheric Administration (“NOAA”) of the United States Department of Commerce, filed the complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (“CERCLA”) and Section 311(f) of the Clean Water Act (“CWA”), 33 U.S.C. § 1321(f), seeking reimbursement for Natural Resource Damages (defined below) due to releases of hazardous substances from the National Priorities List (“NPL”) Superfund site known as the *Koppers Co., Inc. (Charleston Plant) NPL Site* (“Koppers Site”) in Charleston, South Carolina. DOI, acting through the United States Fish and Wildlife Service (“FWS”), and NOAA have been designated as Federal Trustees under Section 107(f) of CERCLA, 42 U.S.C. § 9607(f) and under the CWA, 33 U.S.C. § 2706(b). See Executive Order 12580, as amended by Executive Order 12777, and the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 C.F.R. Part 300.

B. The Office of the Governor of the State of South Carolina through the South Carolina Department of Health and Environmental Control (“SCDHEC”) and the South Carolina Department of Natural Resources (“SCDNR”) (collectively, the “State Trustees”), are co-plaintiffs on the complaint in this matter, and seek damages for injury to natural resources pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and pursuant to South Carolina Code Ann. Section 44-56-200. The State Trustees are acting in their capacity as Trustees for Natural Resources which have been affected by the releases of hazardous substances. 40 C.F.R. § 300.605.

C. In the Complaint, the Plaintiffs allege that Beazer East, Inc. (“Defendant”), formerly known as Koppers Company, Inc., is liable for injury to, destruction of, loss of, or loss of use of certain Natural Resources resulting from the release of oil or hazardous substances including, but not limited to, polycyclic aromatic hydrocarbons (“PAHs”), arsenic, copper, chromium, lead, and zinc into the soils, sediments, surface water and groundwater at or from the Koppers Site.

D. The Federal and State Trustees share trusteeship for Natural Resources alleged to be affected by the Release and have worked together to assess the alleged Natural Resources injuries and losses allegedly caused by the Release and to plan restoration to compensate for those losses. The Trustees believe the obligations of the Defendant set forth in this Consent Decree, including the obligation to perform restoration and pay additional sums as described herein, constitute adequate compensation for Natural Resources Damages allegedly arising from the Release.

E. On October 21, 2016, the Federal and State Trustees jointly published a document entitled “Draft Damage Assessment and Restoration Plan and Environmental Assessment for The Koppers Site, Charleston, South Carolina” (“Draft DARP/EA”) that outlines a proposal to restore salt marsh and benthic habitat at two sites within the Charleston Harbor estuary to compensate the public for alleged injuries to Natural Resources, including ecological services allegedly injured, lost or destroyed due to the Release. Public notice of the Draft DARP/EA was published in a major local newspaper of general circulation, and the public was provided 30 days to submit comments on the Draft DARP/EA. No comments were received and, on July 10, 2017, the Federal and State Trustees issued a Final DARP/EA and Finding of No

Significant Impact.

F. Neither the execution of this Consent Decree by the Defendant nor the entry of this Consent Decree by the United States District Court shall be deemed or construed to be: (1) an admission by the Defendant of any liability arising out of the transactions or occurrences alleged in the Complaint; (2) an admission by the Defendant that the Plaintiffs' assessment of the Natural Resource Damages allegedly resulting from the Release is correct or that there has been any damage to Natural Resources; (3) an acknowledgement that a release of oil or hazardous substances at the Koppers Site caused Natural Resource Damages; or (4) a waiver or estoppel of Defendant's factual and legal defenses to any alleged liability for Natural Resource Damages at this or any other location.

G. The Defendant does not admit, does not waive and reserves the right to dispute any factual or legal statements, positions or assertions set forth in this Consent Decree except in an action to enforce the Consent Decree. Defendant denies all allegations in the Complaint.

H. This Consent Decree resolves alleged Natural Resource Damages recoverable by the United States and the State from Defendant for injury to, destruction of, or loss of use or impairment of Natural Resources, except as otherwise set forth in this Consent Decree.

I. The Parties to this Consent Decree agree, and the Court by entering this Consent Decree finds, that this Consent Decree: (i) has been negotiated by the Parties in good faith; (ii) will avoid prolonged and complicated litigation among the Parties; (iii) will expedite the restoration of Natural Resources or resource services that were allegedly injured or lost due to the Release; and (iv) is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1367(a), 42 U.S.C. §§ 9607 and 9613(b) and 33 U.S.C. § 1321(f). This Court also has personal jurisdiction over the Defendant. The United States and each State Trustee are authorized to bring this action pursuant to 42 U.S.C. § 9607(f). Solely for the purposes of this Consent Decree, including the enforcement thereof, Defendant waives all objections and defenses that it may have to jurisdiction of this Court or to venue in this District. Venue lies in this District pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b).

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and the State Trustees, and upon the Defendant and its successors and assigns. Any change in ownership or corporate or other legal status including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of the Defendant under this Consent Decree.

3. The undersigned representative of the Defendant certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally the Defendant to this document, and has identified on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. Defendant shall notify the U.S. Department of Justice, NOAA, DOI, SCDNR and SCDHEC of any change in the identity or address of the Defendant, its agent for service, or its counsel.

4. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent

Decree, as well as to any vendor, supplier, or contractor retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

5. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of their officers, directors, employees, agents, vendors, suppliers, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

IV. DEFINITIONS

6. Unless otherwise defined herein, terms used in this Consent Decree that are defined in CERCLA, 42 U.S.C. § 9601, or in regulations promulgated pursuant to CERCLA, shall have the meanings assigned to them in that statute or regulation. Whenever the terms set forth below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

- a. “CERCLA” means the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- b. “Clean Water Act” or “CWA” means the Clean Water Act of 1972, 33 U.S.C. §1251, *et seq.*
- c. “Complaint” means the Complaint filed by the United States, SCDNR and SCDHEC in this action.
- d. “Consent Decree” or “Decree” means this Consent Decree and all appendices attached hereto. All appendices are incorporated herein by reference.
- e. “Day” means a calendar day unless expressly stated to be a Working Day.
- f. “Defendant” means Beazer East, Inc.

- g. “DOI” means the United States Department of the Interior and any successor departments or agencies of the United States.
- h. “Drayton Hall Restoration Project” means the natural resource restoration project required by Section VI, and as more fully described in the Drayton Hall Restoration Project Statement of Work attached as Appendix A, of this Consent Decree.
- i. “Effective Date” means the effective date of this Consent Decree as provided in Section XIV of this Consent Decree.
- j. “Federal Trustees” means the United States Department of the Interior, acting through the United States Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration of the United States Department of Commerce.
- k. “FWS” means the Fish and Wildlife Service of the United States Department of the Interior, and any successor departments or agencies of the United States.
- l. “Interest” means interest calculated in the manner specified by CERCLA Section 107(a), 42 U.S.C. § 9607(a).
- m. “Natural Resources” means that definition as provided in 42 U.S.C. § 9601(16) and 9607(a)(4)(C), and applicable regulations at 43 C.F.R. Part 11, as well as applicable South Carolina law, and shall include land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, pertaining to, or otherwise controlled by the United States or the State of South Carolina.
- n. “Natural Resource Damages” means any damages recoverable by the United States or the State of South Carolina on behalf of the public for injury to, destruction of,

loss of, or loss of use of Natural Resources at the Koppers Site as a result of an alleged release of oil or hazardous substances, including but not limited to: (i) the reasonable costs of assessing such injury, destruction, or loss or impairment arising from or relating to such a release; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost Natural Resources or of acquisition of equivalent resources; (iii) the costs of planning such restoration activities; (iv) compensation for injury, destruction, loss, impairment, diminution in value, or loss of use of Natural Resources; and (v) each of the categories of recoverable damages described in 43 C.F.R. § 11.15 and applicable state law and recoverable under CERCLA Section 107(a), 42 U.S.C. § 9607(a) and under Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321.

o. “NOAA” means the National Oceanic and Atmospheric Administration of the United States Department of Commerce.

p. “NTHP” means the National Trust for Historic Preservation.

q. “Paragraph” means a portion of this Decree identified by an Arabic numeral or an upper-case letter.

r. “Parties” means the Defendant, the United States, and SCDNR and SCDHEC as agencies of the State of South Carolina, and “Party” means any one of the named “Parties.”

s. “Plaintiffs” means the United States, SCDNR and SCDHEC; each separately, “Plaintiff.”

t. “Release” means the release of oil or hazardous substances including, but not limited to, polycyclic aromatic hydrocarbons (PAHs), arsenic, copper, chromium, lead, and zinc into the soils, sediments, surface water and groundwater at or from the Koppers Site.

- u. “Section” means a portion of this Decree identified by a Roman numeral.
- v. “Koppers Site” means the National Priorities List (“NPL”) Superfund site known as the *Koppers Co., Inc. (Charleston Plant) NPL Site*, located in Charleston, South Carolina, including particularly the Koppers Company wood-treatment facility on approximately 45 acres of the Site that is generally bounded on the north by Milford Street, on the south by Braswell Street, on the east by the King Street Extension, and on the west by the Ashley River.
- w. “SCDHEC” means the South Carolina Department of Health and Environmental Control.
- x. “SCDNR” means the South Carolina Department of Natural Resources.
- y. “SOW” means the Statement of Work for the Drayton Hall Restoration Project, attached as Appendix A to this Consent Decree.
- z. “State” means the State of South Carolina.
- aa. “State Trustees” means SCDNR and SCDHEC.
- bb. “Subparagraph” means a portion of this Consent Decree identified by a lower case letter or an Arabic number in parenthesis.
- cc. “Subsection” means a portion of this Consent Decree identified by a Roman numeral and an upper-case letter.
- dd. “Trustees” or “Natural Resource Trustees” means, collectively and/or individually, the State Trustees and the Federal Trustees.
- ee. “United States” means the United States of America, acting on behalf of DOI and NOAA, as Natural Resource Trustees.

ff. “Working Day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree where the last day would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next Working Day.

V. GENERAL PROVISIONS

7. This Consent Decree provides the terms upon which the Parties agree to settle all claims of the Plaintiffs against the Defendant, under applicable state and federal law, for Natural Resource Damages allegedly resulting from the Release.

8. In settlement of the claims of the Natural Resource Trustees, Defendant will perform those actions provided in Section VI (Compensation for Natural Resource Injuries) and make the payments set forth in Section VII (Reimbursement of Costs) below.

9. All activities undertaken by the Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations.

VI. COMPENSATION FOR NATURAL RESOURCE INJURIES

A. DRAYTON HALL RESTORATION PROJECT

10. Defendant shall fund, perform, and complete the Drayton Hall Restoration Project Statement of Work described in Appendix A to this Consent Decree (all provisions of which are incorporated in and enforceable under this Consent Decree), in accordance with the procedures set forth in this Section and the Statement of Work. In the event of a conflict between the procedures outlined in this Section and the procedures outlined in the Statement of Work, the Statement of Work controls.

11. Defendant's Project Coordinator. Not later than 30 Days after the Effective Date of this Consent Decree, Defendant shall notify the Trustees, in writing, of the name, address, and telephone number of its designated Project Coordinator. The person so designated shall have technical expertise sufficient to adequately manage all aspects of the Drayton Hall Restoration Project and shall be responsible for supervising and directing all activities necessary to implement the Drayton Hall Restoration Project in accordance with the terms of this Consent Decree. Defendant may subsequently change its designated Project Coordinator by providing written notice to the Trustees at least 30 Days prior to the change.

12. Trustee Council. The Trustees shall oversee implementation of the Drayton Hall Restoration Project specified in this Consent Decree. Such oversight shall be effected through a Trustee Council, consisting of one representative designated by each of FWS, NOAA, SCDHEC, and SCDNR. This Council shall act on behalf of the Trustees, and by consensus, on all matters related to the Drayton Hall Restoration Project under the terms of this Consent Decree, including, but not limited to:

- a. overseeing implementation of the Drayton Hall Restoration Project, including construction and monitoring;
- b. reviewing and approving appropriate Corrective Actions pursuant to Section 3.5 of the SOW to ensure that the Performance Criteria set forth in Section 3.4 of the SOW (*see* Appendix A to this Consent Decree) will be met;
- c. providing Defendant with a Construction Completion Certificate when the Construction Requirements set forth in Section 3.1 of the SOW have been met and a Project Completion Certificate when the Performance Criteria set forth in Section 3.4 of the SOW have

been met; and,

d. performing duties associated with the formal dispute resolution process, whenever necessary, as described in this Consent Decree (Section XI).

13. Restoration Project Implementation. The following implementation requirements of the SOW are each separately enforceable requirements of this Consent Decree subject to Stipulated Penalties (Section XII) for non-performance:

Table 1:

| Requirement | Deadline |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Defendant Designates Restoration Project Coordinator | Within 30 Days of Effective Date of Consent Decree |
| Defendant or its designee submits timely, technically, and administratively complete applications for all Federal, State and local permits and other consultations required by Section 3.1.3 of the SOW | Within 45 Days of Effective Date of Consent Decree |
| Commencement of Invasive Species Removal activities required by Section 3.1.2 of the SOW | During the first March 1 to May 31 period, following issuance of the permits required by Section 3.1.3 of the SOW, but no later than 24 months after the Effective Date of the Consent Decree |
| Commencement of Dike Breaching construction activities required by Section 3.1.1 of the SOW | Within 12 months of the issuance of the permits required by Section 3.1.3 of the SOW, but no later than 24 months after the Effective Date of the Consent Decree |
| Submit Post-Construction Report | Within 60 Days of Construction Completion as defined by Section 3.1.1 of the SOW |
| Second application of herbicide as required by the Invasive Species Removal activities required by Section 3.1.2 of the SOW | During the first March 1 to May 31 period, following Trustee approval of the Post-Construction Report required by Section 3.3.2 of the SOW |
| Conduct Annual Monitoring protocol | At 12, 24, and 36 months following Construction Completion as defined by Section 3.1.1 of the SOW |
| Submit Annual Monitoring Report | At 15 and 27 months following Construction Completion as defined by Section 3.1.1 of the SOW |
| Submit Final Report | At 39 months following Construction Completion as defined by Section 3.1.1 of the SOW, <u>or</u> 90 Days after Corrective Action |

14. Permits. Where any compliance obligation under this Section requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Defendant may seek relief under the provisions of Section X (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendant has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

15. Restoration Project Construction Completion.

a. In accordance with Section 3.3.2 of the SOW, Defendant shall provide the Trustee Council with a Post-Construction Report no later than 60 Days after Construction Completion of the Drayton Hall Restoration Project. Such report shall be signed by a registered professional engineer and Defendant's Project Coordinator and include information sufficient to show that all activities necessary to construction of the Drayton Hall Restoration Project have been completed in accordance with the Construction Requirements identified in Section 3.1 of the SOW. The report shall include the following statement, signed by a responsible corporate official of the Defendant:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

The Trustee Council or its designees will inspect the Drayton Hall Restoration Project after

receipt of such report.

b. If, based upon its post-construction inspection of the Drayton Hall Restoration Project and consideration of any other relevant information, the Trustee Council determines that construction of the Drayton Hall Restoration Project is in accordance with the Construction Requirements identified in Section 3.1 of the SOW, the Trustee Council shall issue and provide to Defendant a dated “Construction Completion Certificate,” certifying that construction of the Drayton Hall Restoration Project is complete.

c. If the Trustee Council determines that the Drayton Hall Restoration Project has not been constructed in accordance with the Construction Requirements identified in Section 3.1 of the SOW:

(1) The Trustee Council will determine what additional activities or corrective actions must be undertaken by Defendant for construction of the Drayton Hall Restoration Project to conform to the Construction Requirements identified in Section 3.1 of the SOW and will provide written notice to the Defendant identifying those activities or corrective actions.

(2) Within 30 Working Days after receipt of such notice, Defendant shall submit a draft work plan for conducting such activities or corrective actions, with the schedule for implementation, to the Trustee Council.

(3) The Trustee Council will approve the draft work plan or disapprove such plan with comments. In the event of disapproval, Defendant will have 30 Working Days following receipt of the Trustee Council’s comments to revise and resubmit the draft work plan for approval. This process will be repeated until the draft work plan is approved by the Trustee Council or until dispute resolution is invoked pursuant to Section XI of this Consent Decree.

Upon approval by the Trustee Council, the draft work plan shall become the final work plan for completion of the Drayton Hall Restoration Project. Defendant shall implement the work plan according to the schedule identified therein.

(4) Defendant shall notify the Trustee Council of its completion of such activities and the Trustee Council shall thereafter again evaluate whether the Drayton Hall Restoration Project has been constructed in accordance with the Construction Requirements identified in Section 3.1 of the SOW. If the Trustee Council determines construction is complete, then it shall so certify as provided in Paragraph 15(b). If the Trustee Council determines that the Construction Requirements have not been achieved, it shall again follow the procedures specified in Paragraph 15(c) until Defendant has met the Construction Requirements set forth in Section 3.1 of the SOW, or, if dispute resolution is invoked under Section XI (Dispute Resolution), the issuance of a final determination that no further action to complete construction is necessary.

16. Restoration Project Site Protection. No later than 60 Days following the Effective Date of this Consent Decree, Defendant, working in concert with the NTHP, shall act to place and record on the Drayton Hall Restoration Project site a Conservation Easement in substantially the form of Appendix B to this Consent Decree that restricts future use(s) of the Drayton Hall Restoration Project site in a manner sufficient to protect and preserve the ecological benefits of the Drayton Hall Restoration Project in perpetuity. Defendant shall act to ensure that the conservation easement shall be recorded in the public records of Charleston County, South Carolina, and shall provide proof of recording to the United States and the Trustee representatives as identified in Appendix C.

17. Restoration Project Monitoring. Following the date of issuance of the Construction Completion Certificate, Defendant shall initiate the post construction monitoring requirements set forth in Section 3.2.5.2 of the SOW and the annual monitoring requirements set forth in Section 3.2.5.3 of the SOW and submit all monitoring reports to the Trustee Council as required therein.

18. Restoration Project Completion. At the end of the period prescribed for monitoring performance of the Drayton Hall Restoration Project in the SOW, and after receipt of the final report required by Section 3.3.4 of the SOW, the Trustee Council shall determine whether the Performance Criteria for the Drayton Hall Restoration Project specified in Section 3.4 of the SOW have been achieved. If the Trustee Council finds that the Performance Criteria have been achieved, then it shall issue and provide to Defendant a dated “Project Completion Certificate” certifying that the Drayton Hall Restoration Project is complete. If the Trustee Council finds that any of the Performance Criteria set forth in Sections 3.4.1 through 3.4.4 of the SOW has not been achieved, the Trustee Council shall identify and notify Defendant of the applicable and corresponding Corrective Actions set forth in Sections 3.5.1 through 3.5.5 of the SOW that need to be undertaken in order for the Drayton Hall Restoration Project to meet its Performance Criteria. Subject to the limitations set forth in Section 3.5 of the SOW, the procedures specified in Paragraph 15(c) of this Consent Decree shall be followed until Defendant has met the Performance Criteria set forth in Section 3.4 of the SOW for the Drayton Hall Restoration Project, or, if dispute resolution is involved under Section XI (Dispute Resolution), a final determination is issued that no further actions are required to be undertaken by Defendant. Upon issuance of the Project Completion Certificate by the Trustees, Defendant shall have fully

performed its obligation to implement the Drayton Hall Restoration Project under this Consent Decree.

19. Access. For the purpose of overseeing and monitoring implementation of the Drayton Hall Restoration Project, Defendant agrees that it shall cooperate with the Trustees, as appropriate, and shall not contest that the Trustees and their designated representatives should be granted:

a. the right to be present at all times that Defendant is performing any field activity involved in the construction, monitoring, or correction of the Drayton Hall Restoration Project;

b. access, to the extent within Defendants' control, at all reasonable times to the locations (including vessels) being used by Defendant, including its contractors, during field implementation of the Drayton Hall Restoration Project; and,

c. access to all non-privileged documents of Defendant or its contractors relating to the Drayton Hall Restoration Project.

The Trustees may designate other representatives, including, but not limited to, Federal and State employees, and Federal and State contractors and consultants, to observe, monitor, assess, or assist in overseeing the progress of the Drayton Hall Restoration Project.

20. Use of Contractors by Defendant. Defendant shall provide a copy of this Consent Decree to all contractors hired to perform any Drayton Hall Restoration Project work or activity, and to each person representing Defendant with respect to the Drayton Hall Restoration Project, and shall condition all contracts entered into for the purposes of performing any Restoration Project work or activity upon performance of that work or activity in conformity with the terms of this Consent Decree. Defendant or its contractors shall provide written notice of the Consent

Decree to all subcontractors hired to perform any portion of the Drayton Hall Restoration Project. Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Drayton Hall Restoration Project contemplated herein in accordance with this Consent Decree.

B. PAYMENT OF ADDITIONAL DAMAGES

21. Within 30 Days of the Effective Date of this Consent Decree, Defendant shall pay damages in the amount of \$400,000.00 to compensate for additional damages to Natural Resources allegedly due to the Release, but not compensated for through the Drayton Hall Restoration Project. Said damages shall be paid into NOAA's Damage Assessment and Restoration Revolving Fund (DARRF), for deposit and maintenance in a sub-account within that Fund to be known as the "Beazer East (Koppers Charleston Superfund Site) Restoration Account." Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with current EFT procedures, referencing DOJ Case Number 90-11-2-08343. Payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of South Carolina following lodging of this Consent Decree. Any payments received by the Department of Justice after 4:00 pm (Eastern Time) will be credited on the next business day. Defendant shall provide written notice of this payment to all Trustees in accordance with Section XVII (Notice). The funds paid into the DARRF shall be held in that account for use by the Trustees, acting through the Trustee Council, solely to plan and implement a future restoration action of benefit to Natural Resources allegedly affected by the Release.

22. Within 30 Days of the Effective Date of this Consent Decree, Defendant shall pay damages in the amount of \$390,000.00 to compensate for injury to groundwater allegedly due to the Release not compensated for by the Drayton Hall Restoration Project. Said damages shall be paid to SCDHEC by cashier's or certified check made payable to the South Carolina Department of Health and Environmental Control. Defendant shall send the check and notice of payment, referencing "Beazer East (Koppers Co.) Charleston Superfund Site)" Natural Resource Damages Groundwater Settlement and this civil action case name and number to Susan Fulmer, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201. Defendant shall provide written notice of this payment to all Trustees in accordance with Section XVII (Notice). The funds paid to the SCDHEC shall be used by the Trustees, acting through the Trustee Council, solely to plan and implement a future restoration action of benefit to ground water or compensate the public for the loss in value or use of the ground water.

VII. REIMBURSEMENT OF COSTS

23. Within 30 Days after the Effective Date of this Consent Decree, Defendant shall pay the following sums to each Plaintiff, in accordance with the specified procedure for payment, as complete settlement of all costs incurred, or to be incurred, by each Plaintiff and recoverable as Natural Resource Damages:

a. Assessment and Restoration Costs Incurred by NOAA and DOI/FWS.

Defendant shall pay a total of \$820,069.74 to the United States to reimburse the Natural Resource Damage costs of assessment and restoration planning incurred by NOAA and DOI/FWS for the Release. Payment shall be made by FedWire EFT to the U.S. Department of Justice in accordance with current EFT procedures, referencing DOJ Case Number 90-11-2-

08343. Payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit of the United States Attorney's Office for the District of South Carolina following lodging of this Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day. Defendant shall also provide notice of this payment according to Section XVI (Notice).

(1) Of the total amount paid by Defendant under this Subparagraph, \$95,690.14 shall be applied to reimburse Natural Resource Damage costs of assessment and restoration planning incurred by DOI/FWS.

(2) Of the total amount paid by Defendant under this Subparagraph, \$724,379.60 shall be applied to reimburse Natural Resource Damage costs of assessment and restoration planning incurred by NOAA.

b. Assessment and Restoration Costs Incurred by SCDHEC. Defendant shall pay \$144,230.39 to SCDHEC to reimburse Natural Resource Damage costs of assessment and restoration planning allegedly incurred for the Release. Payment shall be made to SCDHEC by cashier's or certified check made payable to the South Carolina Department of Health and Environmental Control. Defendant shall send the check and notice of payment, referencing "Beazer East (Koppers Co.) Charleston Superfund Site" Natural Resource Damages Settlement and this civil action case name and number to Susan Fulmer, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, SC 29201. Defendant shall also provide notice of this payment according to Section XVI (Notice).

c. Assessment and Restoration Costs Incurred by SCDNR. Defendant shall pay \$35,699.87 to SCDNR to reimburse Natural Resource Damage costs of assessment and

restoration planning allegedly incurred for the Release. Payment shall be made by cashier's or certified check made payable to the SC Dept. of Natural Resources. The Defendant shall send the check and notice of payment, referencing "Beazer East (Koppers Co.) Charleston Superfund Site" and this civil action case name and number, to Shannon Bobertz, Chief Counsel, SC Department of Natural Resources, P.O. Box 167, Columbia, SC 29202. Defendant shall also provide notice of this payment according to Section XVI (Notice).

24. Notice of Payment. Upon making any payment under this Section, Defendant shall send written notice that payment has been made to the United States, NOAA, DOI, SCDHEC, and SCDNR, in accordance with Section XVI and Appendix C.

25. Interest on Late Payments. In the event any payment required by this Section is not made when due, Defendant shall pay Interest on the unpaid balance commencing on the payment due date and accruing through the date of full payment. Interest payments shall be paid in the same manner as the overdue principal amount and shall be directed to the same fund or account as the overdue principal amount. Interest is in addition to any Stipulated Penalties.

VIII. RESPONSIBILITY FOR COMPLIANCE

26. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any Federal or State statute or regulation. The Plaintiffs do not, by their consent to this Consent Decree, warrant or aver in any manner that the Defendant's compliance with this Consent Decree will constitute or result in compliance with the requirements of any Federal, State, or local laws or regulations. Nothing in this Consent Decree shall be construed to affect or limit in any way the obligation of Defendant to comply with all Federal, State, and local laws and regulations governing any activity required by this Consent Decree.

27. Notwithstanding any action by the Plaintiffs, including, without limitation, their issuance of a Final DARP/EA, or the review and approval of any design, plan, report, and other information or action formulated by the Defendant under this Consent Decree, the Defendant is and shall remain solely responsible for compliance with all terms and requirements of this Consent Decree, including those related to the Construction Requirements and Performance Criteria applicable to the Drayton Hall Restoration Project, and the requirements of all Federal, State, and local laws and regulations applicable thereto.

IX. NO ASSUMPTION OF LIABILITY BY TRUSTEES

28. Plaintiffs do not assume any liability by entering into this Consent Decree. Neither the United States nor the State Trustees shall be held out as a party to any contract entered into, by, or on behalf of Defendant in carrying out activities pursuant to this Consent Decree. Neither the Defendant nor any such contractor shall be considered an agent of the United States or the State Trustees.

29. Defendant waives all claims against the United States and the State Trustees for damages or reimbursement or for setoff of any payments made or to be made to the United States or the State Trustees arising from or on account of any contract, agreement, or arrangement between Defendant and any person for performance of the Drayton Hall Restoration Project, including, but not limited to, claims on account of construction delays.

X. FORCE MAJEURE

30. “Force Majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant’s contractors that delays or prevents the performance of any obligation under this

Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any potential Force Majeure event (a) as it is occurring and (b) following the potential Force Majeure, such that the delay and any adverse effects of the delay are minimized. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

31. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, Defendant shall provide notice orally or by electronic transmission to howard.schnabolk@noaa.gov or 843-740-1328 (office), within 72 hours of when Defendant first knew that the event might cause a delay. Within seven Days thereafter, Defendant shall provide in writing to the Plaintiffs an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a Force Majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a Force Majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure, provided, however, that if the Trustees, despite the late notice, are able to assess to

their satisfaction whether the event is a force majeure under Paragraph 30 and whether Defendant has exercised its best efforts under Paragraph 31, the Trustees may, in their unreviewable discretion, excuse in writing the Defendant's failure to submit timely notices under this Paragraph. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

32. If the Trustees agree that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by the Trustees for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. The Trustees will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

33. If the Trustees do not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, the Trustees will notify Defendant in writing of that decision, together with an explanation of that decision.

34. If Defendant elects to invoke the dispute resolution procedures set forth in Section XI (Dispute Resolution), it shall do so no later than 15 Days after receipt of the Trustees' notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a Force Majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 30 and 31. If Defendant carries

this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to the Trustees and the Court.

XI. DISPUTE RESOLUTION

35. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the Trustees to enforce any obligation of Defendant arising under this Decree.

36. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of good faith informal negotiations. The dispute shall be considered to have arisen when Defendant sends the Trustees a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the Trustees shall be considered binding unless, within 20 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

37. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the Trustees a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

38. The Trustees shall serve their Statement of Position within 60 Days of receipt of Defendant's Statement of Position. The Trustees' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by them. Within 15 Days after receipt of the Statement of Position, Defendant may submit a Reply. An administrative record of the dispute shall be maintained by the Trustees, solely for the purposes of implementation of this Consent Decree, and shall contain all Statements of Position, including any supporting documentation, submitted pursuant to this Section. Where appropriate, the Trustees may allow submission of supplemental Statements of Position and/or supporting documentation. The Trustees shall consider all Statements of Position and supporting documentation, and, within 60 Days of receiving Defendant's Reply, shall issue a final administrative decision resolving the dispute, and such final decision shall be binding on Defendant unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph. If the Trustees fail to issue a final administrative decision within such 60 Day period, then Defendant may file a motion for judicial review of the dispute in accordance with the following Paragraph.

39. Defendant may seek judicial review of the dispute by filing with the Court and serving on the Trustees, a motion requesting judicial resolution of the dispute. The motion must be filed within 20 Days of receipt of the Trustees' final administrative decision pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

40. The Trustees shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules or upon leave of Court to do so.

41. Standard of Review. Except as otherwise provided in this Consent Decree, in any dispute governed by this Consent Decree, Defendant shall have the burden of demonstrating, based on the administrative record as developed pursuant to Paragraph 38 above or as otherwise ordered by the Court, that the decision of the Trustees is either not in accordance with the requirements of this Consent Decree or otherwise not in accordance with applicable law.

42. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides or the Trustees or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XII (Stipulated Penalties).

XII. STIPULATED PENALTIES

43. Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraph 44 to the Plaintiffs for Defendant's failure to comply with the requirements of this Consent Decree specified below, unless excused under Section X (Force Majeure).

"Compliance" by the Defendant shall include the timely completion of the payments and activities identified in Paragraph 44 within the time schedules established by and approved

pursuant to the requirements of the Consent Decree, Section 3.1 of SOW, or any other documents approved by the Trustees pursuant to this Consent Decree.

44. The following stipulated penalties shall accrue per violation per Day for the Defendant's failure to comply with the deadlines established for the following implementation requirements:

- a. Failure to comply with each deadline for Drayton Hall Restoration Project implementation as set forth in Table 1 of Paragraph 13 of this Consent Decree including for monitoring:

| <u>Penalty per Violation per Day</u> | <u>Period of Noncompliance</u> |
|--------------------------------------|-----------------------------------------------|
| \$ 250 | 1 st through 14 th Day |
| \$ 500 | 15 th through 30 th Day |
| \$ 1,000 | 31 st Day and beyond |

- b. Failure to make each separate payment required by Section VI.B and Section VII in a timely manner:

| <u>Penalty per Violation per Day</u> | <u>Period of Noncompliance</u> |
|--------------------------------------|-----------------------------------------------|
| \$ 250 | 1 st through 14 th Day |
| \$ 500 | 15 th through 30 th Day |
| \$ 1,000 | 31 st Day and beyond |

45. All penalties shall begin to accrue on the Day after performance is due or the Day a violation occurs and shall continue to accrue through the final Day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue with respect to judicial review by this Court of any dispute under Section XI (Dispute Resolution), during the period, if any, beginning on the 31st Day after the Court's receipt of the motion for judicial review until the date that the Court issues a final decision regarding such dispute.

Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

46. Following the determination by the Plaintiffs, individually or jointly, that the Defendant has failed to comply with one of the requirements of this Consent Decree listed above, the Plaintiffs may send the Defendant a written demand for the payment of penalties that describes the noncompliance.

47. Stipulated penalties shall be paid as follows: In any collective action for stipulated penalties brought by all Trustees, fifty percent of any stipulated penalties shall be paid to the United States in accordance with payment instructions provided by the Financial Litigation Unit of the United States Attorney's Office for the District of South Carolina following lodging of the Consent Decree and shall be deposited in the United States Treasury. Twenty-five percent of any stipulated penalties under the preceding Paragraph shall be paid to SCDHEC, in accordance with the instructions set forth in Paragraph 23(b). Twenty-five percent of any stipulated penalties shall be paid to SCDNR, in accordance with the instructions set forth in Paragraph 24(c). Notwithstanding any other provision of this Section, the United States and the State Trustees, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree, in which case the remaining Trustee, or Trustees, shall collect the entirety of stipulated penalties owed, one hundred percent in the case of a single Trustee, and fifty percent each in the case of two Trustees.

48. In the event the Defendant fails to pay stipulated penalties when due, the United States and/or the State Trustees may institute a legal proceeding to collect such penalties, as well as Interest accruing on any unpaid balance, as provided by law; but any such action shall be

initiated in the United States District Court of the District of South Carolina, Charleston Division.

49. All penalties due under this Section shall be due and payable within 30 Days of the Defendant's receipt of a demand for payment from the Plaintiffs, unless the Defendant invokes dispute resolution under Section XI of this Consent Decree. In that case, Stipulated Penalties shall continue to accrue during the informal and formal dispute resolution procedures as provided in this Section and as specified in Paragraph 45, but need not be paid until the following:

- a. If the dispute is resolved by agreement, accrued penalties agreed to be owed shall be paid to the United States and the State Trustees within 30 Days of the agreement.
- b. If the dispute is appealed to this Court and the Plaintiffs prevail in whole or in part, the Defendant shall pay all accrued penalties determined by the Court to be owed to the United States and the State Trustees within 30 Days of receipt of the Court's decision or order.

50. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State Trustees to seek any other remedies or sanctions available by virtue of the Defendant's violation of this Consent Decree, provided, however, that the Trustees shall not seek civil penalties pursuant to Section 122(l) of CERCLA or any other federal or state law for any violation for which a stipulated penalty is provided in this Consent Decree, except in the case of a willful violation of this Consent Decree.

XIII. COVENANTS NOT TO SUE BY PLAINTIFFS

51. Covenant by the United States. In consideration of the actions that will be performed and the payments that will be made by the Defendant under this Consent Decree, and except as specifically provided by Paragraph 53 (General Reservations) and Paragraph 55 (Special Reservations Regarding Natural Resource Damages), the United States covenants not to sue or take administrative action against the Defendant for Natural Resource Damages that have allegedly resulted from the Release. This covenant not to sue shall take effect upon receipt of the payments due from Defendant under Paragraphs 21, 22, and 23 of this Consent Decree. These covenants not to sue are conditioned upon the complete and satisfactory performance by the Defendant of its obligations under Section VI (Compensation for Natural Resource Injuries) and VII (Reimbursement of Costs), payment of all amounts that may become due to the United States under Section XI (Stipulated Penalties), and payment of any Interest owed to the United States due to the failure to timely pay any amount owed to the United States under this Consent Decree. These covenants not to sue extend only to the Defendant and do not extend to any other person.

52. Covenant by the State Trustees. Except as specifically provided in Section XIV (Reservation of Rights by Plaintiffs), the State Trustees covenant not to sue Defendant for Natural Resource Damages allegedly resulting from the Release. This covenant not to sue shall take effect upon receipt of the payments due from Defendant under Paragraphs 21, 22, and 23 of this Consent Decree. These covenants not to sue are conditioned upon the complete and satisfactory performance by the Defendant of its obligations under Section VI (Compensation for Natural Resource Injuries) and VII (Reimbursement of Costs), payment of all amounts that may become due to the State under Section XI (Stipulated Penalties), and payment of any Interest

owed to the State due to the failure to timely pay any amount owed to the State under this Consent Decree. These covenants not to sue extend only to the Defendant and do not extend to any other person.

XIV. RESERVATION OF RIGHTS BY PLAINTIFFS

53. General Reservations. The United States and the State Trustees reserve, and this Consent Decree is without prejudice to, all rights against the Defendant with respect to all matters not expressly included within Section XIII (Covenants Not to Sue by Plaintiffs). Notwithstanding any other provisions of this Consent Decree, the United States and the State Trustees reserve all rights against Defendant with respect to:

- a. claims based on a failure by Defendant to meet a requirement of this Consent Decree;
- b. liability under CERCLA Section 107(a)(4)(A) for costs of removal or remedial action or costs of response incurred by the United States or the State Trustees;
- c. liability for any other costs incurred or to be incurred by the Plaintiffs that are not within the definition of Natural Resource Damages;
- d. liability for damages for any injury to, destruction of, loss of, or loss of use of Natural Resources resulting from any event or releases or threatened releases of hazardous substances or oil unrelated to the Release;
- e. any and all criminal liability; and
- f. violation of any Federal or State law or regulation during the implementation of Drayton Hall Restoration Project or monitoring of such project.

54. The Plaintiffs, individually or jointly, may take any and all legal or administrative enforcement actions appropriate to enforce the terms of this Consent Decree. In the event that the Plaintiffs take legal or administrative actions to enforce this Consent Decree, and the Plaintiffs are the prevailing party, Defendant must pay all reasonable costs incurred by the United States and the State Trustees related to that action including, but not limited to, enforcement costs, attorneys' fees, and Interest accruing on any unpaid balance.

55. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this Consent Decree, the United States and the State Trustees reserve the right to institute proceedings against the Defendant in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damages assessment, based on: (i) conditions with respect to the Koppers Site, unknown to the Trustees as of the date of lodging of this Consent Decree, that result in releases of hazardous substances that contribute to injury to, destruction of, loss of, or loss of use of Natural Resources; or (ii) information received by the Trustees after the date of lodging of this Consent Decree which indicates that the Release has resulted in injury to, destruction of, loss of, or loss of use of Natural Resources of a type unknown, or of a magnitude substantially greater than was known, by the Trustees as of the date of lodging of this Consent Decree. For purposes of this Paragraph, the information and conditions known to the Trustees shall include the information and conditions set forth in the administrative record supporting the Damage Assessment and Restoration Plan/Environmental Assessment ("DARP/EA") and/or the Trustees' and the EPA's files for the Koppers Site or the Release as of the date of the lodging of this Consent Decree.

XV. COVENANTS BY DEFENDANT

56. Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the Plaintiffs, their employees, agents, experts, or contractors, with respect to the Natural Resource Damages or this Consent Decree including, but not limited to, any claims arising out of activities related to the Drayton Hall Restoration Project, including without limitation, claims based on the Trustees' approval of the Drayton Hall Restoration Project, oversight of the Drayton Hall Restoration Project, and/or approval of plans for such activities. Except as provided in Paragraph 61, this covenant not to sue shall not apply in the event that the Plaintiffs bring a cause of action or issue an order pursuant to the reservations set forth in Paragraphs 53 and 55, but only to the extent that Defendant's claims arise from the same damages that the Plaintiffs are seeking pursuant to the applicable reservation.

XVI. EFFECT OF SETTLEMENT

57. Nothing in this Consent Decree shall be construed to create any right in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right of contribution), defenses, claims, demands, and causes of action which each Party may have with respect to the Release against any person not a party hereto.

58. The Parties agree, and by entering this Consent Decree this Court finds that Defendant is entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and SC Code Ann 48-1-10 et. seq. for Natural Resource Damages, provided, however, that if the Trustees exercise their rights under the reservations in Paragraph 55,

Defendant will no longer be entitled to protection from such contribution actions or claims for Natural Resource Damages as are within the scope of the exercised reservation.

59. Defendant agrees that it will notify the United States and the State Trustees in writing no later than 60 Days before bringing a suit or claim for contribution for Natural Resource Damages. Defendant also agrees that it will notify the United States and the State Trustees in writing within 15 Days of service of a complaint or claim upon them relating to a suit or claim for contribution for Natural Resource Damages. In addition, Defendant will notify the United States and the State Trustees within 15 Days of service or receipt of any Motion for Summary Judgment and within 15 Days of receipt of any order from a court setting a case for trial for matters related to this Decree.

60. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs with respect to the Release, Defendant may contest any claims reserved by the Trustees in this Consent Decree, and the Defendant may claim any defense available to it, except that Defendant shall not assert, and may not maintain, any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or any other defenses based upon the contention that the claims raised by the Plaintiffs in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XIII (Covenants Not to Sue by Plaintiffs).

61. The failure of any of the Plaintiffs to insist upon strict and prompt performance of any provision of this Consent Decree shall not operate as a waiver of any requirement of this Consent Decree or of the Trustees' right to insist on prompt compliance in the future with such

provision and shall not prevent a subsequent action by any of the Trustees to enforce such provision.

XVII. NOTICE

62. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses set forth in Appendix C, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, the State Trustees, and the Defendant, respectively.

XVIII. MODIFICATION

63. Any material modification of this Consent Decree shall be made by agreement of the Parties to this Consent Decree and in writing and shall not take effect unless approved by the Court. Any non-material modification of this Consent Decree shall be made by agreement of the Parties to this Consent Decree, shall be in writing, and shall not take effect until filed with the Court. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

64. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon the entry of the Consent Decree in its entirety without modification, addition, or deletion except as agreed to by the Parties.

XIX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

65. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment. The United States and the State Trustees each reserve

the right to withdraw or withhold their consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. The Defendant consents to the entry of this Consent Decree without further notice, but only if this Consent Decree is entered in its entirety without substantive modification, addition, or deletion. If for any reason the Court should decline to approve this Consent Decree in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, this agreement is voidable at the discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties. The Defendant hereby agrees not to oppose entry of this Consent Decree in its present form by this Court or to challenge any provision of this Consent Decree unless the United States and the State Trustees have notified Defendant in writing that they no longer support entry of the Consent Decree.

XX. EFFECTIVE DATE AND RETENTION OF JURISDICTION

66. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered, or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on this Court's docket.

67. The Court shall retain jurisdiction to modify and enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XXI. SIGNATORIES/SERVICE

68. Each undersigned representative of the Defendant, the United States, and the State Trustees certifies that he or she is fully authorized to enter into the terms and conditions of this

Consent Decree and to execute and legally bind such Party to this document. This Consent Decree may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

69. The Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of the Defendant with respect to all matters arising under or relating to this Consent Decree. The Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons. Defendant need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXII. TERMINATION

70. After the Trustees have issued a Certification of Completion pursuant to Section 4 of the SOW, and after Defendant has fulfilled its obligations under Section VI (Compensation for Natural Resource Injuries), Section VII (Reimbursement of Costs), Section XII (Stipulated Penalties), Defendant may serve upon the Trustees a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

71. Following receipt by the Trustees of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination

of this Consent Decree. If the Trustees agree that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

72. If the Trustees do not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section XI. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until 60 days after service of its Request for Termination.

73. Termination of this Consent Decree shall not affect the covenants, reservations, and effects of settlement set forth in Section XIII (Covenants Not To Sue By Plaintiffs), Section XV (Covenants by Defendant), and Section XVI (Effect of Settlement).

XXIII. APPENDICES

74. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the Drayton Hall Restoration Project Statement of Work.

“Appendix B” is the Conservation Easement.

“Appendix C” is the list of persons and addresses for notice pursuant to Section XVII.

XXIV. FINAL JUDGMENT

75. This Consent Decree and its appendices constitute the final, complete, and exclusive understanding among the Parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

76. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State Trustees, and the Defendant.

SO ORDERED.

Date: January 7, 2019

A handwritten signature in black ink, appearing to read "D. Norton", written over a horizontal line.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Beazer East, Inc.

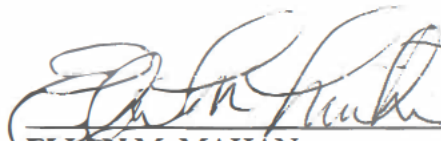
FOR THE UNITED STATES OF AMERICA:

SHERRI A. LYDON
UNITED STATES ATTORNEY

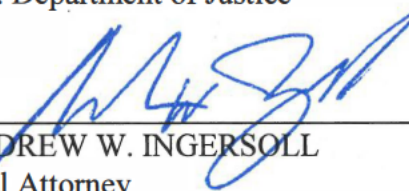
11/9/18
Date

By: s/Barbara M. Bowens
BARBARA M. BOWENS (#4004)
Assistant United States Attorney
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Telephone: (803) 929-3000

11/9/18
Date


ELLEN M. MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

11/9/18
Date


ANDREW W. INGERSOLL
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611

OF COUNSEL:

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Gloucester, MA 01930

BRIGETTE J. BEATON
U.S. Department of the Interior
Office of the Regional Solicitor
75 Ted Turner Drive, S.W., Suite 304
Atlanta, GA 30303

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Beazer East, Inc.

FOR THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL:

1-6-18
Date




DAVID E. WILSON, JR.
Acting Director
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Beazer East, Inc.

FOR THE SOUTH CAROLINA DEPARTMENT OF NATURAL RESOURCES:

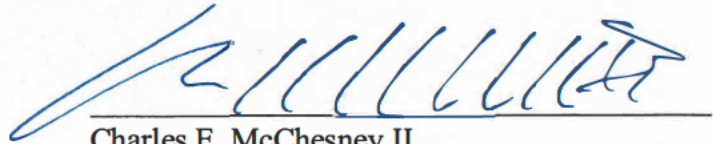
10-31-18
Date


ALVIN TAYLOR
Director
South Carolina Department of Natural
Resources
P.O. Box 167
Columbia, SC 29202

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States et al. v. Beazer East, Inc.

FOR BEAZER EAST, INC.

Nov. 7, 2018
Date



Charles E. McChesney II
Vice President and Secretary
Beazer East, Inc.
c/o Three Rivers Management, Inc.
600 River Ave., Suite 200
Pittsburgh, PA 15212

U.S. et al. v. Beazer East, Inc.
Consent Decree Appendix A
Drayton Hall Restoration Project Statement of Work

**BEAZER EAST, INC
FORMER KOPPERS SITE
CHARLESTON, SOUTH CAROLINA**

**DRAYTON HALL RESTORATION PROJECT STATEMENT OF
WORK**

**FINAL
MAY 2018**

**Beazer East, Inc., Former Koppers Wood Treating Site-Charleston,
South Carolina
Drayton Hall Restoration Project Statement of Work
FINAL
May 2018**

1 INTRODUCTION

Beazer East, Inc. (Beazer) has reached a Natural Resource Damage (NRD) settlement with the Natural Resource Trustees (Trustees) regarding the former Koppers Company Wood Treating Site located on the Ashley River in Charleston, South Carolina (Site). As part of this settlement, Beazer will implement the Drayton Hall Restoration Project as described herein. Specifically, Beazer will reestablish the historical hydrology of an intertidal saltmarsh area located on the north side of the Ashley River (See Location Map) It is anticipated that this semi-impounded marsh area will benefit from the restored hydrologic connection with the Ashley River, thus enhancing habitat for juvenile and adult finfish, juvenile crabs, shorebirds, wading birds, migratory waterfowl, and avian marsh predators.

The Trustees have determined that if the restored hydrologic connections meet the performance criteria outlined in this statement of work, there is reasonable assurance of project success in the long-term, and that the ecological services needed to offset the service losses being credited to the Drayton Hall Restoration Project will be satisfied. The monitoring efforts detailed herein will provide the information necessary to determine this success.

To offset the remaining ecological liability, the Trustees will receive a one-time payment to be used to fund and implement additional ecological projects.

2 DRAYTON HALL PROJECT SITE DESCRIPTION

Historical maps of the Cooper and Ashley Rivers show extensive rice fields dating back to the 1700s. The mid-1800s saw a decline in the rice culture in South Carolina. This decline was accelerated by the Civil War, which contributed to a break down in the plantation system. Three hurricanes, occurring in 1898, 1910 and 1911, breached many of the rice dikes and effectively ended rice growing on the rivers. However, many old rice dikes are still present in the Ashley and Cooper Rivers and have varying impacts on normal tidal flow in and out of the marshes they enclose.

The Drayton Hall project site contains a relict dike. According to historical photography the current dike was built after 1939. Specifically, Mr. Floyd Whitfield, the previous owner thought it was built in the late 1940s by Williams Furniture Company as an impoundment for duck

hunting. However, conversations with Mr. George McDaniel, Director of the Drayton Hall National Historic Preservation Site, revealed that historical records show that there was also a rice dike in the same area in the late 1700s. The site is located on the north side of the Ashley River, directly across from Drayton Hall (see Location Map). The 1939 aerial photography shows the site before the current dike was built (Figure 1). Post-construction photography shows the dike with a parallel dredged canal on the inland side that was probably used as the fill source for the dike (Figure 2). Today, the historical channels are still evident on the river side and the inland side of the dike, but they appear to have silted in as a result of restricted tidal flow. The semi-impounded area enclosed by the current dike is approximately 67 acres. Current vegetation is a mixture of *Spartina alterniflora*, *Juncus roemerianus*, *Phragmites australis*, *Typha angustifolia*, and *Spartina cynosuroides* (Figure 3).

The current dike is broken on the western end. This area is probably where the water control trunk was located. Tidal flow comes in through this break and flows into the dredged canal. There is another break at the eastern end that was created during a previous marsh creation project. That marsh creation effort was performed for the North Charleston Sewer District as mitigation for marsh impacts during a sewer line construction project. The upland area was excavated to intertidal elevation and a connection to a tidal creek was made. Approximately 1.3 acres were excavated and planted in *Spartina alterniflora*. The substrate of this connection is unusual in that it is phosphate rock. The break in the dike primarily drains the marsh creation site and does not significantly connect with the channel coming from the break at the western end.

There is a third break located on the eastern end of the dike. This area is designated as Breach F (Figure 4). This break is fifteen to twenty feet wide and connects to one of the historical creeks. Observations made at high and low tide indicate that the water flow is coming and going from the creek connected to the river and also from the dredged channel flowing from the west. Very little water appears to flow to the created break on the eastern end of the dike. Breach F is the design template for the other breaches proposed in this statement of work.

Initial pedestrian surveys of the marsh enclosed by the existing dike have revealed stands of *Phragmites australis*. *Phragmites* is an exotic and invasive species that spreads rapidly and replaces the natural marsh vegetation. Control of this species through removal will be a part of the restoration effort described.

The National Trust for Historic Preservation owns the property and a significant acreage around the marsh. They have agreed to allow Beazer to create breaches in the dike, but desire to leave as much of the vegetation on the remaining dike as possible.

3 PROJECT IMPLEMENTATION REQUIREMENTS

The objective of the Drayton Hall Restoration Project is to restore the historical hydrology of this semi-impounded marsh and to enhance the ecological value of this wetland as benthic and salt marsh habitat. Beazer will breach the existing dike at the historical tidal creek locations and

reconnect the upper and lower segments of the creeks, as well as remove or reduce invasive species (*Phragmites australis*). Beazer will monitor water surface elevation, vegetation type, vegetation survival (in replanted areas), and channel depth for a period of 3 years. Reports will be submitted annually, in addition to a pre-construction, post-construction, and final report.

3.1 CONSTRUCTION REQUIREMENTS

3.1.1 Dike Breaching and Vegetation Replanting

Construction Mobilization for dike breaching shall mean when the equipment is onsite to commence activities described in 3.1.1. Construction Completion shall mean the activities described in 3.1.1 as related to dike breaching and replanting are complete.

A total of five new breaches (points A, B, C, D, and E) will be created in the dike (Figure 4). To construct the dike breaches, a barge-mounted or amphibious track hoe will enter the impoundment from the western end and travel in the dredged canal. The track hoe will travel to the location of proposed Breach A and begin excavation. The dike will be dug out fifteen to twenty feet wide with side slopes of approximately 3:1, and down to an elevation slightly above the surrounding marsh. The track hoe will then stand on the excavated dike area and reach into the historical channel between the Ashley River and the dike. A shallow excavation of the channel will be made out as far as the track hoe will reach. All spoil will be placed on the dike. The track hoe will then move back into the inside of the impoundment and dig the remaining portion of the dike out to an elevation approximately three feet below the surface of the marsh. The interior shelf will be breached to connect the inside dredged canal with the new dike breach. Figure 5 shows a typical completed dike breach detail. The track hoe will then move east to the site of the next proposed breach.

As mentioned above, all spoil will be placed on the existing dike. Coconut mat will be staked over the fresh spoil piles to minimize erosion back into the marsh. Any damage created by the track hoe activity in the inner marsh area will be leveled to original grade as the track hoe exits the area. Any disturbed marsh will be regraded and replanted with *Spartina alterniflora* on 2-3 foot centers during the growing season (March 15 – December 1). The dredged channels will be excavated with side slopes of approximately 3:1, depending on the stability of the substrate.

As-Built measurements of the dike channels will be documented and shared with the Trustees for approval before continuing with vegetation replanting.

3.1.2 Invasive Species Removal

“HABITAT”, or other appropriate herbicide approved for aquatic use, will be sprayed on the *Phragmites* stands on two (2) separate occasions. The herbicide will be sprayed on the stands inside the dike from an airboat or helicopter (1) in the first spring (defined as March 1 – May 31) following issuance of the permits required by Section 3.1.3, with (2) a second application in the spring (defined as March 1 – May 31) following construction and after Trustee approval of the Post-Construction Report. A third treatment is possible for persistent stands larger than one (1) acre in size in the spring of the second year following Construction Completion. Applications

will be documented in Pre-Construction and Annual reports.

Beazer reserves the right to modify the exact methods for applying herbicide in consultation with the Trustees, based on ground conditions, availability of contractors and equipment, and other conditions that may become apparent in the field.

3.1.3 Regulatory Requirements

The regulatory branches of the South Carolina Department of Health and Environmental Control (“SCDHEC”) and the US Army Corps of Engineers have been contacted concerning the basics of this project. Both agencies indicated that since the proposed project is designed to restore marsh function, they did not anticipate any problems with issuing permits for the activity. A Section 10 of the Rivers and Harbors Act of 1899 dredging permit application and a Section 404 of the Clean Water Act dredge and fill permit application will be required for the agencies to evaluate and permit the project. Wetland and critical line surveys will be required. The Trustees have completed an Endangered Species Act Section 7 consultation with the U.S. Fish and Wildlife Service for this project. The attached manatee guidelines (Appendix D) are to be followed during all project-related activities.

3.2 MONITORING REQUIREMENTS

A number of pre- and post-construction monitoring activities have been identified for the Drayton Hall Restoration Project. Monitoring will be conducted using both qualitative and quantitative field methods to determine progress toward achievement of the performance criteria. The nature and frequency of these activities, along with their corresponding reporting obligations are discussed below. The Trustees must be notified prior to each monitoring event to allow for their participation. The final locations for all tidal monitoring stations, channel depth/elevation monitoring stations, and the vegetation monitoring reference site described below will be established with the approval of the Trustees. Similarly, the inspection quadrants used for vegetation monitoring will be approved by any Trustee(s) present during a vegetation inspection.

3.2.1 Tidal Monitoring

Tidal monitoring in the marsh will be accomplished by the installation of water surface elevation (WSE) recording devices at eleven (11) tidal monitoring locations (10 tidal monitoring stations and one 1 reference station). The approximate locations of the tidal monitoring stations have been determined upon review of the light detecting and ranging (LIDAR) topographic survey of the marsh area (Appendix A-1), which was used to determine the location of the relict channels that historically extended into the marsh area behind the dike. Water elevation will be determined using an infrared beam projected from the instrument to the water surface through perforated PVC monitoring pipe installed for the duration of the monitoring effort in the marsh. Water surface elevations will be recorded every five (5) minutes for a 48-hour period according to the monitoring schedule presented below. The tidal monitoring stations will be evenly distributed across the site, with the final locations established by a registered surveyor, referenced to a USGS benchmark.

One set of five tidal monitoring stations will be placed parallel to the existing dike in the historical creek channel. The other set of five tidal monitoring stations will be placed between the dike and the upland edge of the marsh at various ground elevations to monitor tide height and duration.

A reference tidal monitoring station will be placed in close proximity to the diked area. It will be located outside of the diked area, referenced to the NOAA water level station (No. 8664841) at Magnolia Plantation in the Ashley River (Figure 6).

In addition to the tidal monitoring stations described above, two (2) WSE devices will be installed at two stations (Appendix A-2). One will be installed in the interior marsh midway between breach “B” and breach “C”. The second WSE monitoring station will be installed in the Ashley River marsh. The WSE monitoring station on the Ashley River side of the existing dike will be placed opposite the interior WSE monitoring station and an equal distance from the dike as the interior WSE monitoring station. Following installation, these two (2) WSE monitoring stations will be monitored in accordance with the same schedule as that proposed for the eleven (11) tidal monitoring stations. Water surface elevations will be recorded by the remote instrument and their positions will be recorded by a registered surveyor and referenced to a USGS benchmark.

3.2.2 *Vegetation Type Monitoring*

Vegetation type monitoring in the marsh will be accomplished using high resolution multispectral satellite imagery and ground truthing. Vegetation signatures will be imported into a geographical information system (GIS) in order to calculate changes in acreage and species composition. The vegetation signatures will be identified as to particular species by pedestrian survey.

3.2.3 *Replanting Vegetation Monitoring*

3.2.3.1 *Reference Site and Baseline Data*

A reference site will be selected for the purpose of determining success criteria for the areas replanted with nursery-grown *Spartina alterniflora* as a result of impacts due to construction activities. The reference site will be located within the Ashley River Watershed, in close proximity to the areas being impacted, but not within the 67 acre project area. Conditions at the reference site will be very similar to the vegetation and elevation parameters found in the impacted areas prior to construction. Sample plots designed to cross-section the vegetation types along the tidal gradient will be established using the methodology described in 3.2.3.3. Vegetation parameters measured at each plot will include stem counts, average heights, and percent cover, by species. Percent cover will be estimated from an average of cross-sectional area of stems at the substrate and stem counts. The reference site data will be collected prior to any disturbance of the marsh areas. The vegetation composition and densities of the reference site will serve to provide a comparison for marsh restoration in all of the areas impacted during construction.

3.2.3.2 *Survival of Planted Vegetation*

For the purpose of survival monitoring, a sampling grid will be established within each of the replanted areas. During each inspection of the survival of planted vegetation, a 1-m² quadrat will be randomly placed within each of the sampling grids. The number of stems per species will be counted within each quadrat. Notes will also be made on any volunteer plant species present.

3.2.3.3 Vegetation Sampling

The same data collected at the reference site described above will also be collected at the marsh restoration areas in one 1-m² quadrat randomly located within the grids. To facilitate specimen counts, quadrats will be subdivided into 25 0.04-m² sub-quadrats. A sample of three randomly selected sub-quadrats will then be surveyed to provide count and density estimates. All surveys, after the initial survival surveys, will be conducted annually near the end of each growing season, during the month of November. Sampling will be conducted concurrently at the reference site and within the three quadrats for comparison.

3.2.4 Channel Depth/Elevation Monitoring

Channel depth and elevation monitoring will be measured in the restored historical channels and dike breaches. The monitoring effort will focus on the historical connection from the proposed dike breaches to the Ashley River. Two permanent monitoring stations will be placed in each channel at points identified using LIDAR data and ground truthing (Appendix B). These points will be areas that have the shallowest water depth in the channels or are choke points. The points will be located using a registered surveyor and elevations will be referenced to a USGS benchmark. Subsequent surveys will be used to physically measure the elevations in a like manner to track changes.

3.2.5 Monitoring Schedule

3.2.5.1 Pre-Construction

3.2.5.1.1 Tidal Monitoring

The ten tidal (10) monitoring stations and one (1) reference station will be installed, along with the two (2) WSE stations approximately ninety (90) days prior to construction mobilization, following the methodology described in 3.2.1. Two 48-hour monitoring events will be scheduled before construction at the eleven tidal monitoring stations and two WSE stations. One event will be scheduled to coincide with the spring tide for that period. Another event will occur at an average high tide. An average high tide will be defined as a tidal event with a predicted high tide of 5.8 feet +/- .5 feet and normal weather conditions to avoid impacts of strong winds and storm water runoff. The predicted high tide of 5.8 feet +/- .5 feet will be based on Charleston Harbor tide charts.

3.2.5.1.2 Vegetation Type Monitoring

High resolution multispectral satellite imagery will be obtained approximately sixty (60) days prior to construction. Pedestrian surveys to identify the species associated with the different imagery signatures will be accomplished at the same time following the methodology described in 3.2.3.3. The reference site will be identified and data collection of that site will occur in the same manner.

3.2.5.1.3 Channel Depth/Elevation Monitoring

A LIDAR survey was flown in May 2005 to determine pre- construction marsh and channel elevations. Locations of the channel monitoring points are detailed in Appendix B. A registered surveyor will physically locate these points in the channel and confirm the LIDAR elevations approximately sixty (60) days prior to Construction Mobilization.

3.2.5.2 *Post-Construction*

Post-construction monitoring will be performed within 30 days following Construction Completion. As-built measurements of the breach dimensions and contours of the channels will be collected by a registered surveyor. Vegetation monitoring will also be conducted to confirm that the areas impacted during construction were replanted with appropriate native vegetation on 2-3 foot centers. In addition, a preliminary evaluation of the ten (10) tidal monitoring stations and one (1) reference station, as well as WSE 1 and WSE 2 located within and outside the remnant dike between breach “B” and breach “C” will be conducted within 30 days of Construction Completion, following the same criteria as 3.2.4 but on two (2) normal tide cycles. These results will be included in the Post- Construction Report (described in 3.3.2).

3.2.5.3 *Annual*

3.2.5.3.1 Tidal Monitoring

Two tidal monitoring events will be performed at the ten (10) tidal monitoring stations, one (1) reference site, and at the two (2) WSE monitoring stations at 12, 24 and 36 months after construction activities are completed. The tidal events will include the spring tide and average high tide monitoring as detailed in Section 3.2.5.1.1.

3.2.5.3.2 Vegetation Type Monitoring

High-resolution multispectral satellite imagery and pedestrian surveys to determine species and changes in vegetation composition throughout the restored marsh will be performed at 12, 24 and 36 months after construction activities are complete. Data collection at the reference site will occur in the same manner.

3.2.5.3.2.1 Survival of Planted Vegetation

Survival of planted material will be evaluated at post- planting intervals of 90, 180, and 365 days.

3.2.5.3.2.2 Vegetation Sampling

An annual vegetation sampling and monitoring program will be conducted at post-planting intervals of 12, 24 and 36 months.

3.2.5.3.3 Channel Depth/Elevation Monitoring

A registered surveyor will measure the channel depth/elevation and contours at the channel monitoring stations and breach locations at 12, 24, and 36 months following Construction Completion.

3.3 REPORTING REQUIREMENTS

3.3.1 *Pre-Construction Report*

The Pre-Construction Report detailing the baseline vegetation stands, tidal elevations and durations, channel depth/elevation, and first *Phragmites* control application will be submitted at least thirty (30) days prior to Construction Mobilization. It will discuss and summarize the results of monitoring implemented in accordance with the requirements of Section 3.2.5.1 and provide raw data and field notes in an appendix or appendices.

3.3.2 *Post-Construction Report*

The Post-Construction Report will detail the breach locations, dimensions and contours, survival sampling of re-vegetated area, and preliminary WSE monitoring station results. This report will be submitted within sixty (60) days after Construction Completion. It will discuss and summarize the results of monitoring implemented in accordance with the requirements of Section 3.2.5.2 and provide raw data and field notes in an appendix or appendices.

3.3.3 *Annual Report*

Annual reports that include the results of the vegetation, tidal, survey work, and WSE monitoring stations will be submitted 15 and 27 months following Construction Completion. It will discuss and summarize the results of monitoring implemented in accordance with the requirements of Section 3.2.5.3, *Phragmites* control results, and provide raw data and field notes in an appendix or appendices.

3.3.4 *Final Report*

A Final Report will be submitted to the Trustees 39 months after Construction Completion and/or 90 days after any final corrective actions if necessary. The Final Report will review data for the entire monitoring period. It will discuss and summarize the monitoring results and will provide raw data and field notes in an appendix or appendices.

3.4 PERFORMANCE CRITERIA REQUIREMENTS

The Performance Criteria can also be viewed in table format in Appendix C.

3.4.1 Tidal Monitoring

Tidal monitoring will be performed at the ten (10) tidal monitoring locations for information only. The two (2) WSE monitoring stations will be monitored for the purpose of determining whether or not the project has successfully restored the historical hydrology within the semi-impounded wetland. The performance criterion for determining the success of this restoration will be as follows: within any one tidal cycle, the maximum high tide water surface elevation at the interior canal monitoring station (WSE 1) shall be equal to the maximum high tide water surface elevation at the Ashley River marsh monitoring station (WSE 2) (+ or – 0.1 feet to allow for equipment error and minor discrepancies). This performance criterion shall be met at the end of three (3) years.

3.4.2 Vegetation Type Monitoring

Monitoring will be performed to document the expansion or contraction of different vegetation types in the marsh enclosed by the existing dike. The Trustees have expressed concern over controlling the expansion of *Phragmites*. Beazer has agreed to conduct two (2) applications of the herbicide “HABITAT,” or other appropriate herbicide approved for aquatic use, to the *Phragmites* stands enclosed by the existing dike. The criterion for success is the reduction of *Phragmites* stands to less than one contiguous acre throughout the 67 acre impoundment.

3.4.3 Construction Replanting Vegetation Monitoring

In those areas that are to be replanted with nursery-grown *Spartina* as a result of impacts due to construction activities, the performance criteria are as follows: (1) survival of at least 75% of the plants (planted on 2-3 foot centers) twelve (12) months after planting and (2) achieving stem densities in the replanted areas equal to or greater than 75% of that in the identified reference site at the end of three (3) years.

3.4.4 Channel Depth/Elevations

The purpose of the breach creations in the existing dike is to restore the historical channels from the Ashley River as open and free flowing, without substantial sediment buildup or evidence of closure. Two criteria will be evidence of success: (1) the breaches must be maintained as open and free flowing, and not obstructed for a period of three (3) years post construction, and (2) elevations at the channel monitoring points will have increased by no more than 0.5 feet (i.e. depth will have decreased by no more than 0.5 feet) at the end of three (3) years.

3.5 CORRECTIVE ACTION REQUIREMENTS

Beazer may undertake a Corrective Action at any time during the monitoring period if the Performance Criteria set forth in section 3.4 are not being met. Beazer will be required to undertake

Corrective Action if any of the performance criteria have not been met within the appropriate timeframe as described in above. Within 90 days of completing any approved Corrective Action, Beazer will submit a Final Report documenting the completed Corrective Action.

3.5.1 Tidal Monitoring

In the event that the hydrological performance criterion described in Section 3.4.1 is not met, Beazer will evaluate the situation and will present to the Trustees, for their approval, a Corrective Action. This Corrective Action may include, but not be limited to, dredging the tidal creek channel(s) or the installation of water control structures. Beazer will perform annual WSE monitoring for three years following the Corrective Action. Beazer will continue to submit annual reports during this time period. Beazer will not perform additional corrective actions at the end of the three-year monitoring period; however, Beazer will submit a Final Corrective Action Report 39 months after completion of the corrective action.

3.5.2 Vegetation Type Monitoring

Three performance criteria for vegetation type monitoring apply to the Drayton Hall Restoration Project. One criterion for success will be to reduce the stands of *Phragmites* in the semi-impounded wetland to less than one contiguous acre throughout the 67-acre impoundment. If this criterion for success is not achieved after two (2) applications of “HABITAT”, or other appropriate herbicide approved for aquatic use, Beazer will spot treat areas greater than one acre a third time. Beazer will not guarantee results and the corrective action will be satisfied by this third application.

3.5.3 Replanting Vegetation Monitoring

Areas impacted by construction activities will be re-vegetated with nursery-grown *Spartina* plants, or other appropriate native vegetation. If either the plant survival or stem density criterion is not met within the appropriate timeframe as described in Section 3.4.3, Beazer will evaluate the situation and will present to the Trustees, for their approval, a Corrective Action. This activity may include but not be limited to replanting to achieve the target survival and stem density and/or amending the sediments or soils with organic material or slow-release inorganic fertilizer. Beazer will perform annual vegetation monitoring until the criterion is met or for three years following the Corrective Action, whichever comes first. Beazer will continue to submit annual reports during this time period. Beazer will not perform additional corrective actions at the end of the three-year monitoring period; however, Beazer will submit a Final Corrective Action Report 39 months after completion of the corrective action, or 90 days after the performance criterion is met, whichever comes first.

3.5.4 Channel Depth/Elevations

If at least three breach locations do not meet the success criteria detailed in Section 3.4.4, Beazer will present the Trustees with a corrective action to open the historical channels to the Ashley River and correspondingly extend the monitoring period for an additional three years. Beazer will continue to submit annual reports during this time period. There will be no further corrective action at the end of that additional three-year monitoring period; however, Beazer will submit a

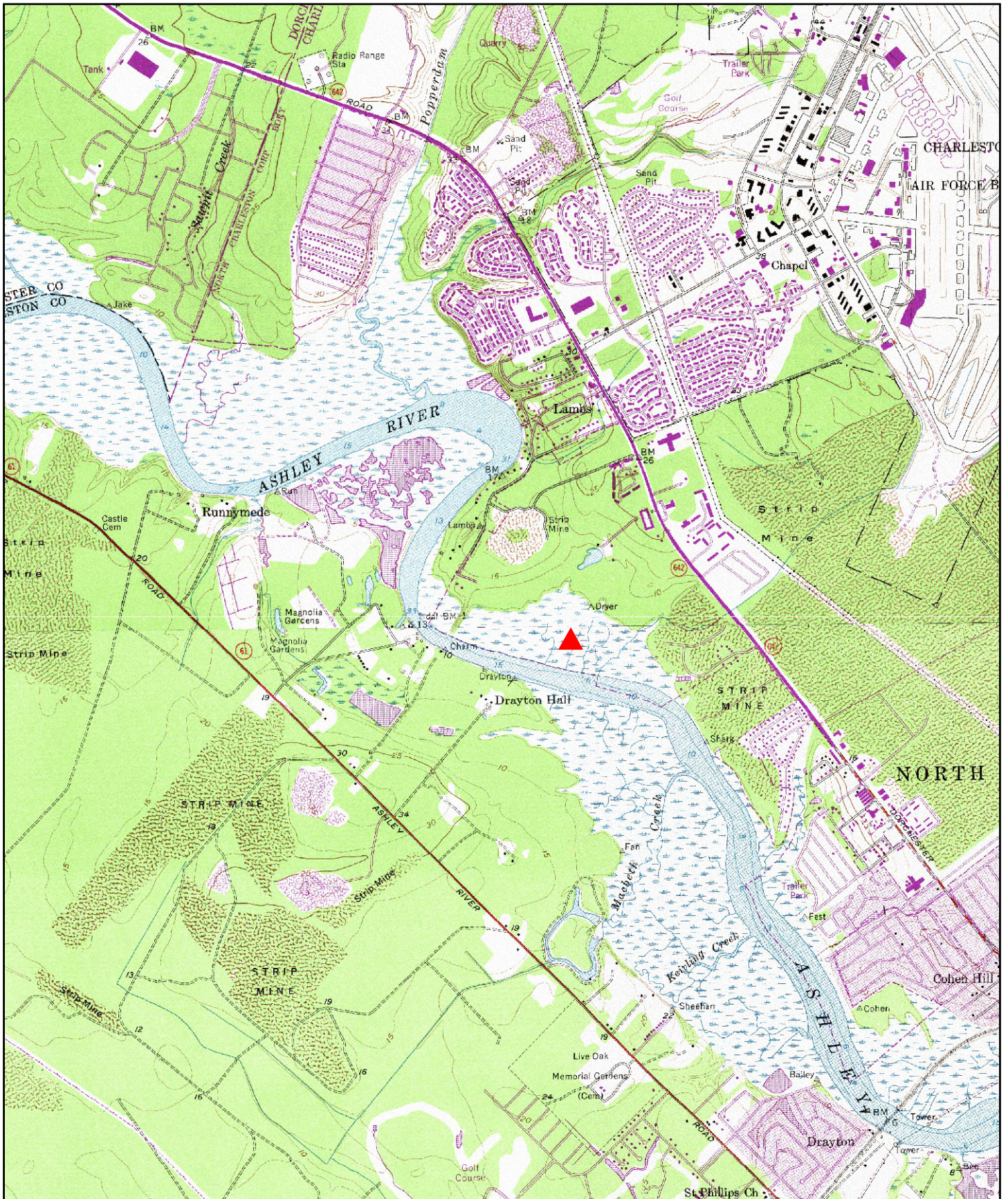
Final Corrective Action Report 39 months after implementation of the corrective action.

Drayton Hall Restoration Project Schedule

| ACTION | SCHEDULE |
|--------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Pre-Construction Activities | |
| Beazer Designates Restoration Project Coordinator | Within 30 days of Effective Date of Consent Decree |
| Beazer submits timely, technically, and administratively complete applications for all Federal, State, and local permits | Within 45 days of Effective Date of Consent Decree |
| Install tidal monitoring stations | At least 60 days before Construction Mobilization |
| Install Water Surface Elevation stations | At least 60 days before Construction Mobilization |
| Conduct tidal/elevation monitoring protocol (2 48-hr periods) | At least 30 days before Construction Mobilization, but exact timing to be dictated by tides (1 Spring Tide, 1 avg High Tide) |
| Gather current imagery for vegetation type monitoring | At least 30 days before Construction Mobilization |
| Identify “Construction Replanting” reference sites and sample vegetation | At least 30 days before Construction Mobilization |
| Install Elevation Monitoring Stations (2) | At least 30 days before Construction Mobilization |
| Ground truth channel depth and elevation with ground survey | At least 30 days before Construction Mobilization |
| Apply herbicide to <i>Phragmites</i> stands as required in Section 3.1.2 | During the first March 1 to May 31 period after issuance of the permits, but no later than 24 months after the Effective Date of the Consent Decree |
| Submit Pre-Construction Report | At least 30 days before Construction Mobilization |
| Construction Activities | |
| Commencement of Dike Breaching construction activities required by Section 3.1.1 | Within 12 months of the issuance of the permits; and following Trustee approval of the Pre-Construction Report and first invasive species removal application, but no later than 24 months after the Effective Date of the Consent Decree |
| Completion of Dike Breaching construction activities required by Section 3.1.1 | Within 120 days of Construction Mobilization |
| Document As-Built measurements of breaches/contours | Within 30 days of completion of dike breaching activities |
| Vegetation Replanting activities required by Section 3.1.1 | Within the first growing season (March 15 – December 1) following Trustee approval of the As Built Measurements |
| Post-Construction Activities | |
| Apply herbicide to <i>Phragmites</i> stands as required in Section 3.1.2 | During the first March 1 to May 31 period following Trustee approval of the Post-Construction Report |
| Conduct replanting monitoring and tidal/elevation monitoring protocol | Within 30 days of Construction Completion |
| Submit Post-Construction Report | Within 60 days of Construction Completion |
| Conduct Annual Monitoring protocol | At 12, 24, and 36 months post-Construction Completion |
| Submit Annual Monitoring Report | At 15 and 27 months post-Construction Completion |
| Submit Final Report | At 39 months post-Construction Completion, <u>OR</u> 90 days after Corrective Action |

4 FINAL CERTIFICATION

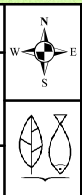
Once the monitoring period is complete and the Final Report (or Final Corrective Action Report, if applicable) is submitted to the Trustees, the Lead Administrative Trustee will issue a Certification of Completion of the Beazer East, Inc, Former Koppers Site, Charleston South Carolina NRDA Restoration Project.



EXTERNAL SOURCES: USGS TOPO QUADS

Created By: Matthew T Zielke - gis@sabinc.net
 Date Created: February 6, 2009
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 Environmental Land Management Consultants
 P.O. Box 1072 Summerville, SC 29484
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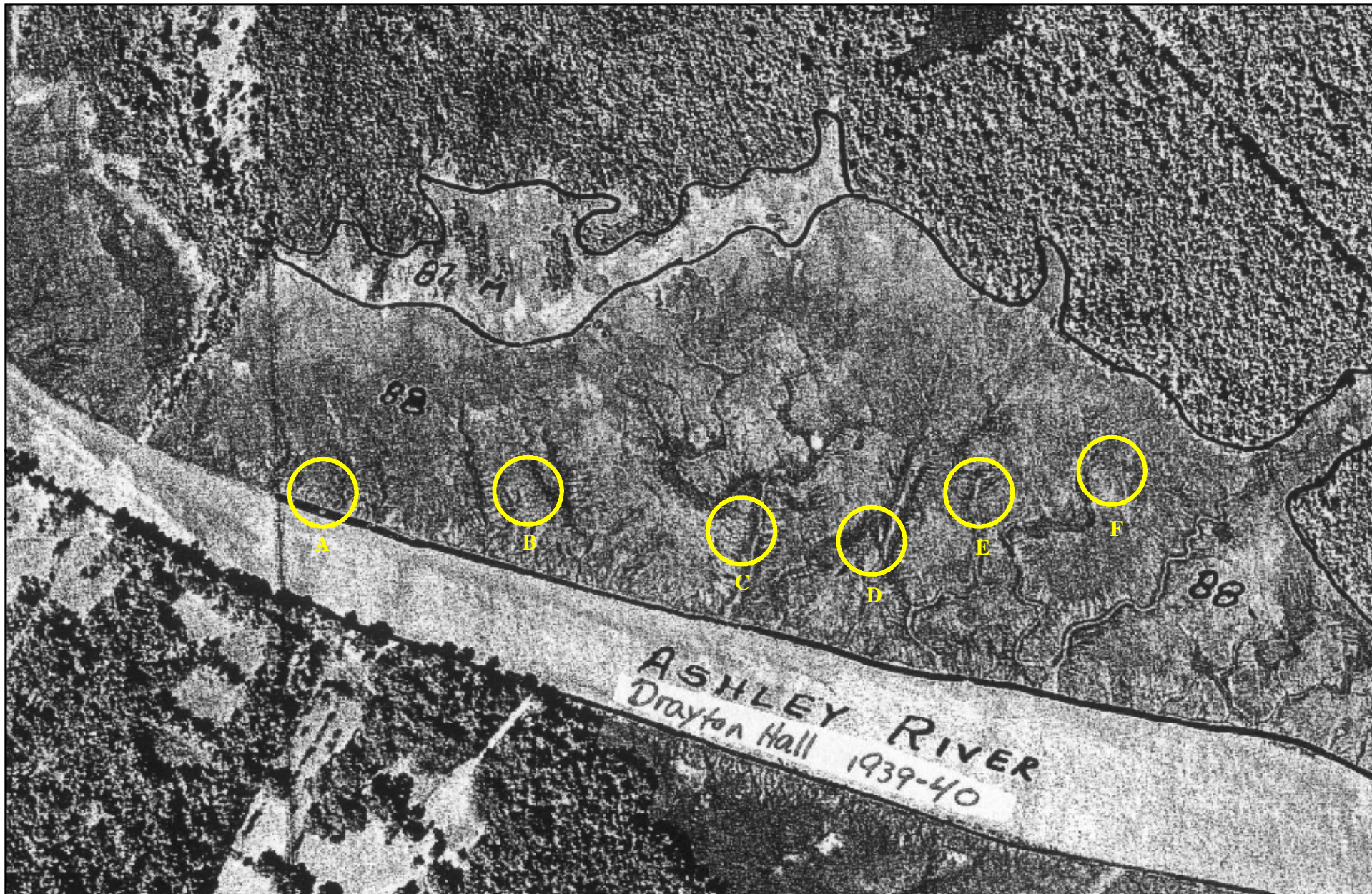
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LOCATION MAP BEAZER - NRDA STRATEGY CHARLESTON COUNTY, SC

LEGEND

▲ DRAYTON HALL



EXTERNAL SOURCES: 1939 AERIAL - GEOREFERENCED

Created By: Matthew T Zielke - gis@sabinc.net
 Date Created: February 6, 2009
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 Environmental Land Management Consultants
 P.O. Box 1072 Summerville, SC 29484
 843.871.5383 (phone) 843.871.2050 (fax)
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**FIGURE 1 - 1939 AERIAL PHOTO
 BEAZER - NRDA STRATEGY
 CHARLESTON COUNTY, SC**

0 450 900
 Feet

LEGEND

 BREACH LOCATIONS

Disclaimer: This map is a graphic representation of data obtained from various sources. All efforts have been made to warrant the accuracy of this map. However, Sabine & Waters, Inc. disclaims all responsibility and liability for the use of this map.



EXTERNAL SOURCES: SCDNR 2006 INFRARED AERIAL

| | |
|--------------------------------------|-----------------------------------------------------------|
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| Date Created: June 20, 2016 | Environmental Land Management Consultants |
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| R:\csc\dat\beazer_mda update 2016\ | 843.871.5383 (phone) 843.871.2050 (fax) |
| mapping\master.mxd | http://www.sabine.net |

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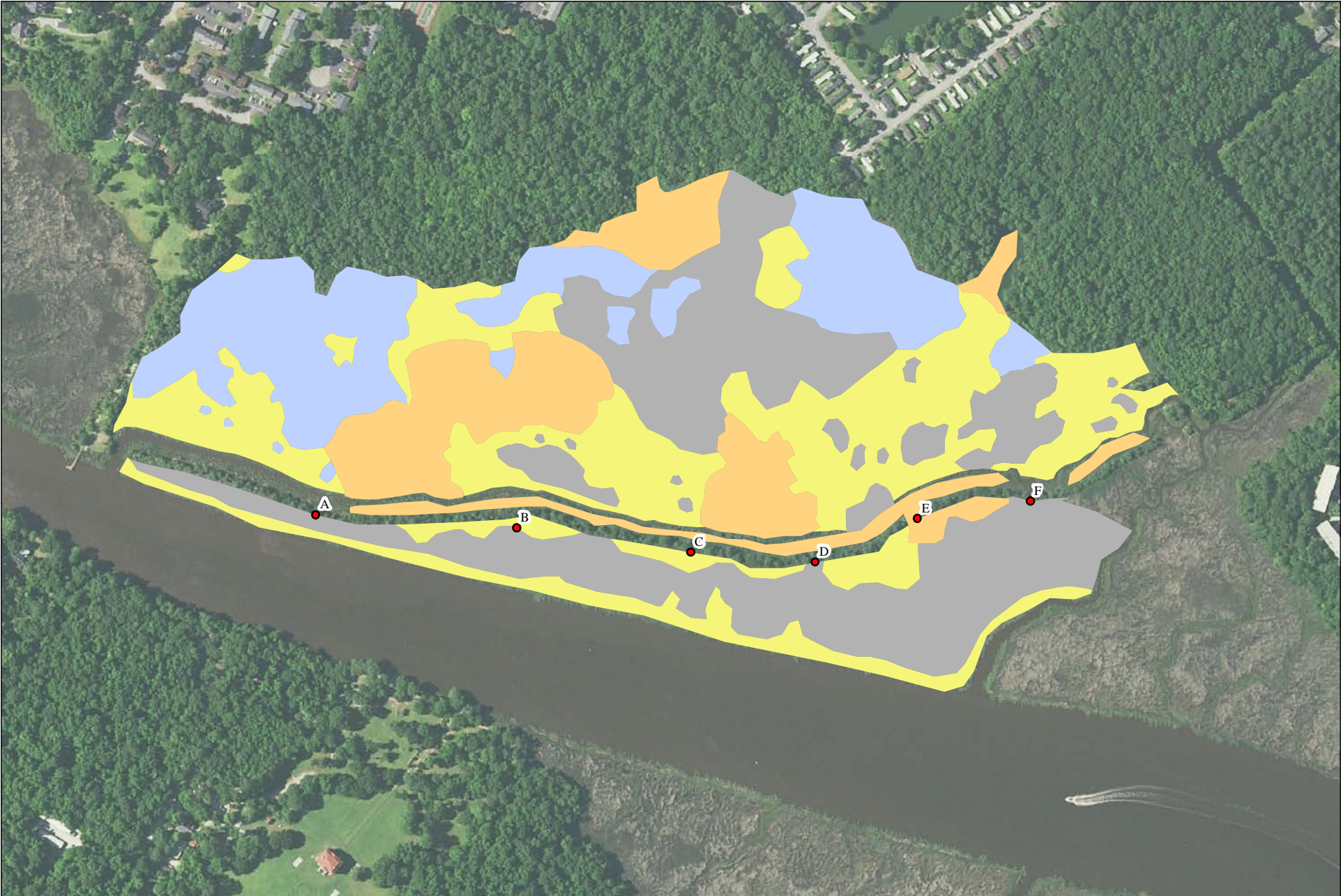
REVISED: 7/27/2016

**FIGURE 2 - 2006 INFRARED AERIAL PHOTO
BEAZER - NRDA STRATEGY UPDATE
CHARLESTON COUNTY, SC**



LEGEND

● BREACH LOCATIONS



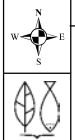
EXTERNAL SOURCES: NAIP 2015 TRUE COLOR AERIAL

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| Date Created: June 20, 2016 | Environmental Land Management Consultants |
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| mapping\veg_ident.mxd | http://www.sabine.net |

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REVISED: 7/27/2016

FIGURE 3 - PHOTO INTERPRETED VEGETATION - ID 2016
BEAZER - NRDA STRATEGY UPDATE
CHARLESTON COUNTY, SC



| LEGEND | |
|-------------------------------------------------------------------------------------------------------------------------------|----------------------------------|
| ● | BREACH LOCATIONS |
| | JUNCUS ROEMERIANUS: +/- 26 AC |
| | JUNCUS/SPARTINA MIX: +/- 16 AC |
| | PHRAGMITES AUSTRALIS: +/- 15 AC |
| | SPARTINA ALTERNIFLORA: +/- 25 AC |



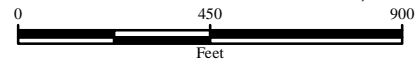
EXTERNAL SOURCES: NAIP 2015 INFRARED AERIAL

| | |
|--------------------------------------|-----------------------------------------------------------|
| Created By: Stephen Bennett | Sabine & Waters, Inc. |
| Date Created: June 20, 2016 | Environmental Land Management Consultants |
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**FIGURE 4 - 2015 TRUE COLOR AERIAL PHOTO
BEAZER - NRDA STRATEGY UPDATE
CHARLESTON COUNTY, SC**

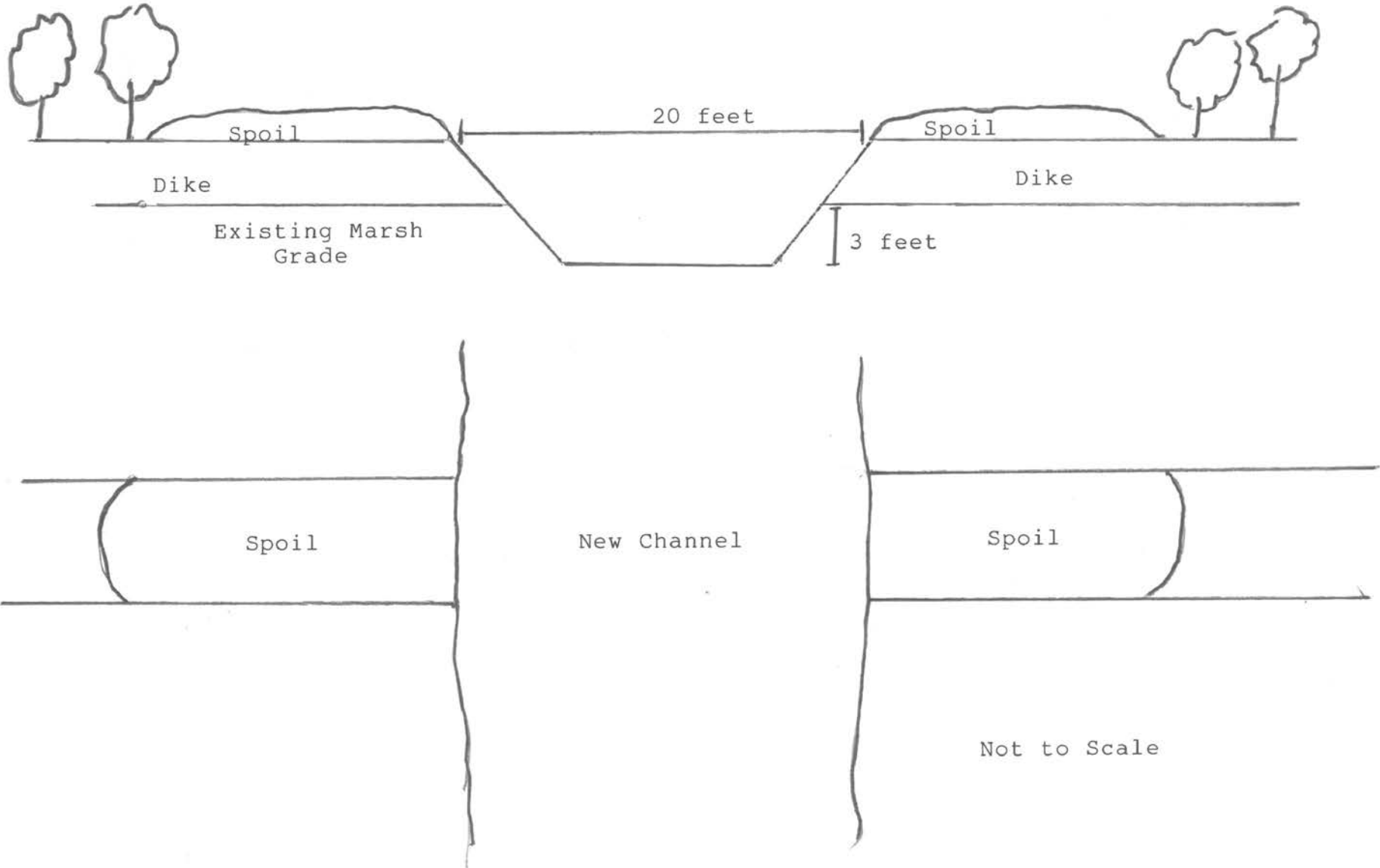


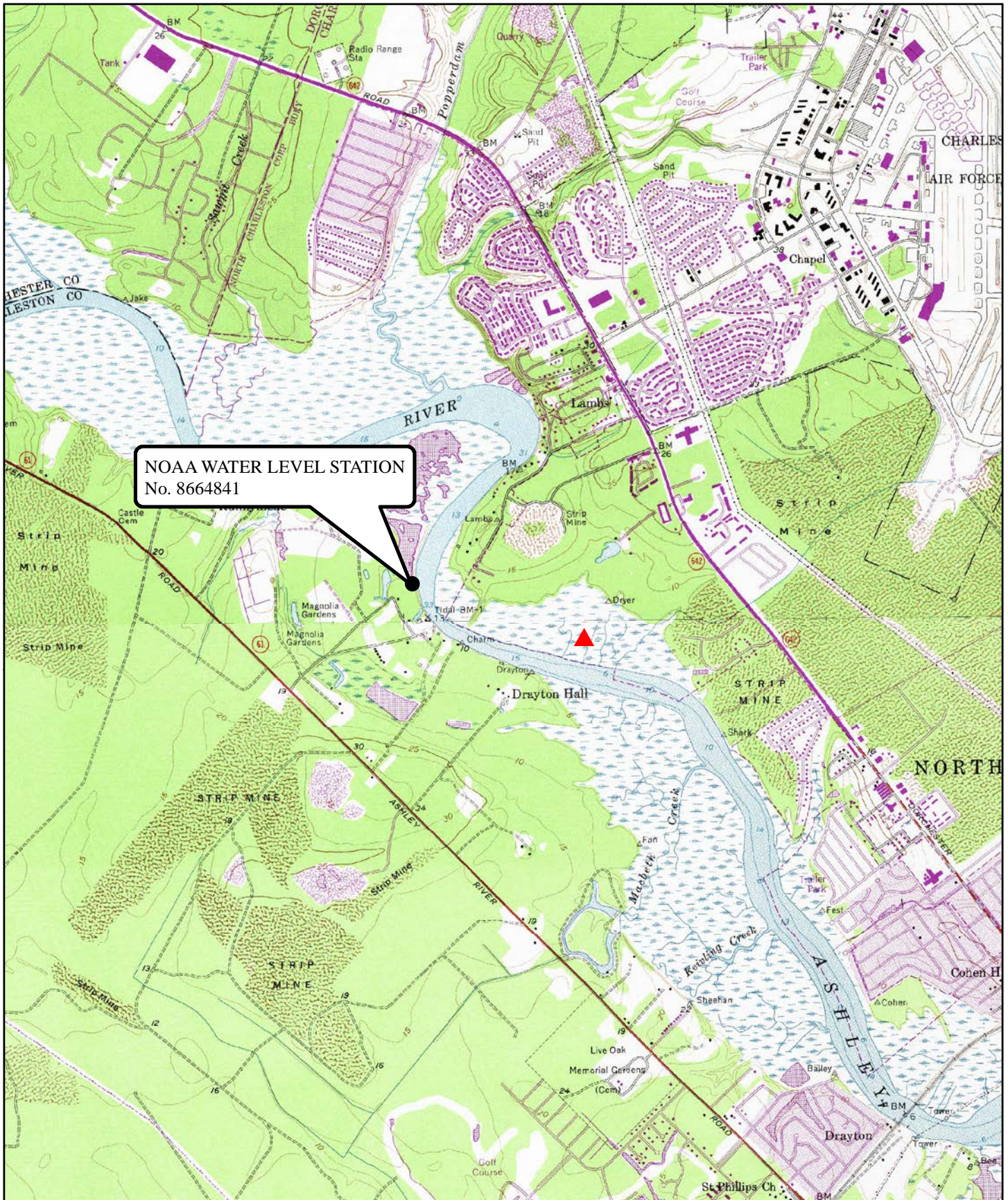
LEGEND

● BREACH LOCATIONS

TYPICAL BREACH DETAIL
Drayton Hall

FIGURE 5





NOAA WATER LEVEL STATION
No. 8664841

EXTERNAL SOURCES: USGS TOPO QUADS

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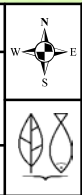


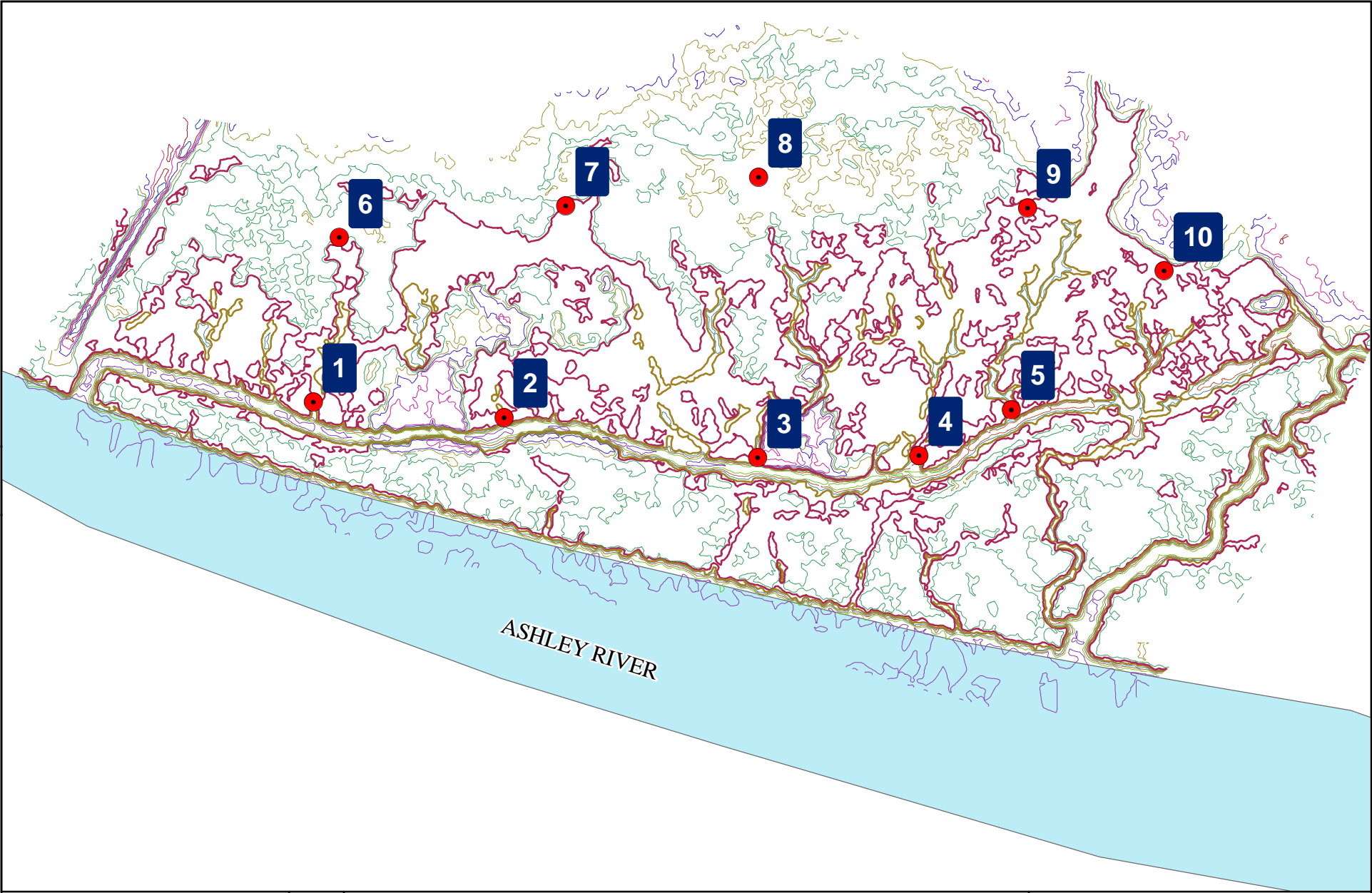
FIGURE 6
NOAA WATER LEVEL STATION
PERFORMANCE CRITERIA AND
MONITORING PLAN - NRDA
CHARLESTON COUNTY, SC

0 2,700 5,400
 Feet

LEGEND

▲ DRAYTON HALL

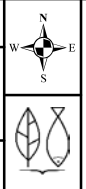
Appendix 1 to
Drayton Hall Statement of Work



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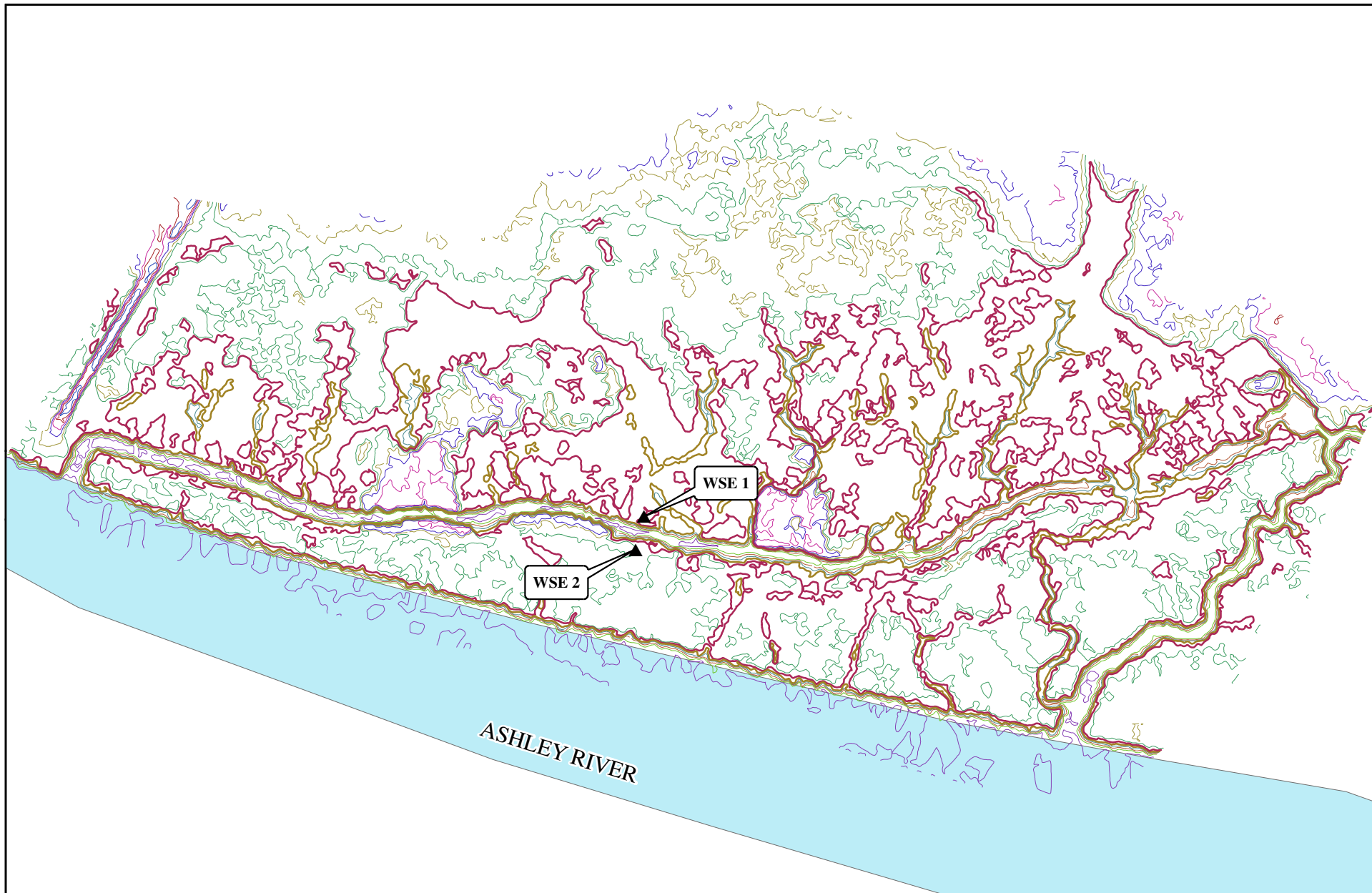
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APPENDIX A-1
LIDAR AND TIDAL MONITORING STATIONS
PERFORMANCE CRITERIA AND MONITORING PLAN - NRDA
CHARLESTON COUNTY, SC

LEGEND

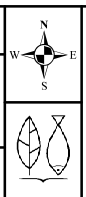
| | | |
|---------------------|------|------|
| MONITORING STATIONS | 1 ft | 6 ft |
| -2 ft | 2 ft | 7 ft |
| -1 ft | 3 ft | 8 ft |
| 0 ft | 4 ft | 9 ft |
| | 5 ft | |



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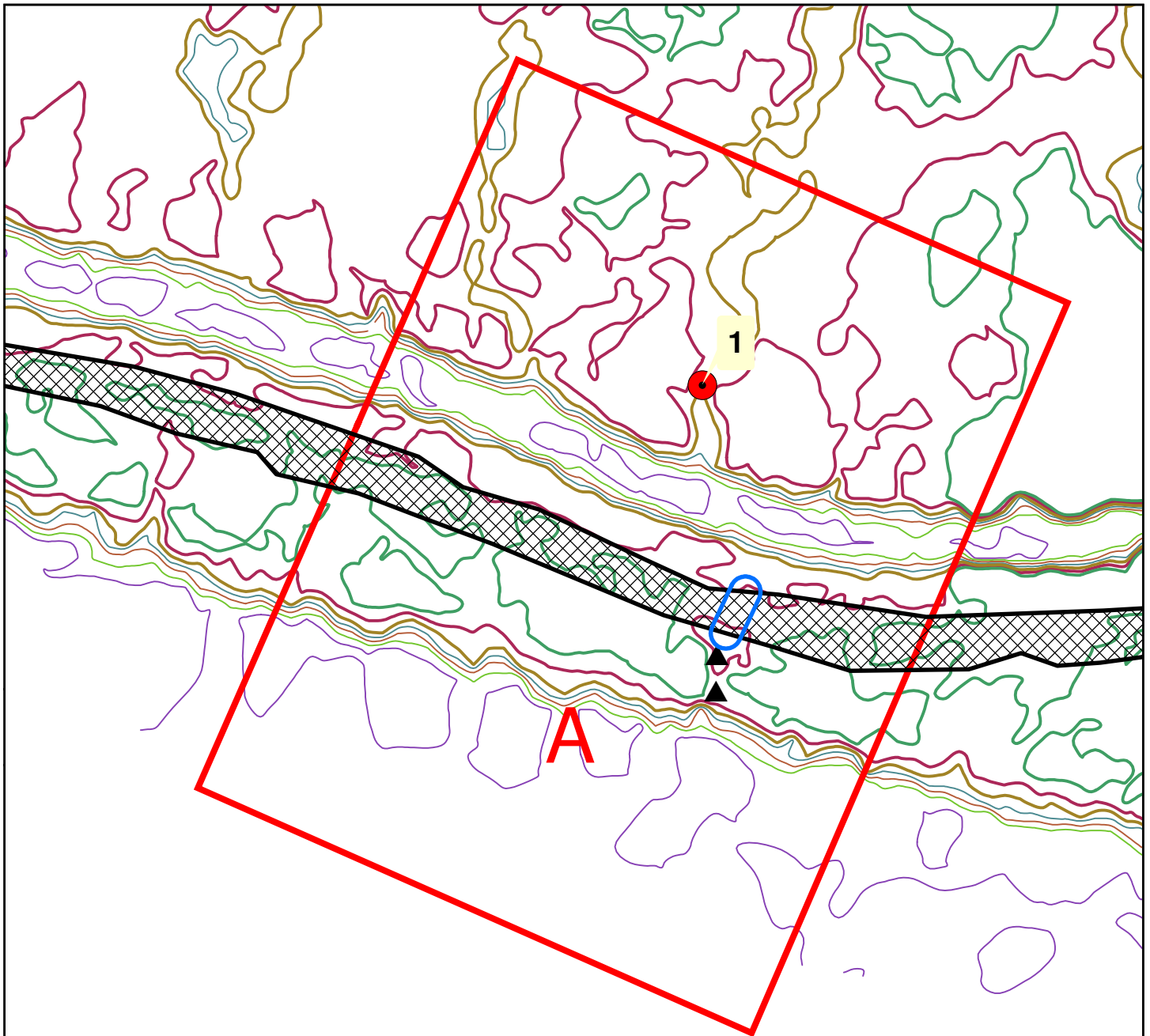


APPENDIX A-2
LIDAR AND WATER SURFACE ELAVATION (WSE) STATIONS
PERFORMANCE CRITERIA AND MONITORING PLAN - NRDA
CHARLESTON COUNTY, SC













LEGEND

| | | |
|----------------|--------|--------|
| ▲ WSE STATIONS | — 2 ft | — 7 ft |
| — -2 ft | — 3 ft | — 8 ft |
| — -1 ft | — 4 ft | — 9 ft |
| — 0 ft | — 5 ft | |
| — 1 ft | — 6 ft | |

Appendix 2 to
Drayton Hall Statement of Work

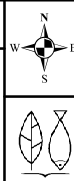


LEGEND

| | | | |
|-------------------------------------------------------------------------------------|-----------------------------------------|-------------------------------------------------------------------------------------|-------|
|  | DIKE |  | -1 ft |
|  | PROPOSED DIKE BREACH |  | 0 ft |
|  | PROPOSED DIKE BREACHES & CHANNEL DETAIL |  | 1 ft |
|  | TIDAL MONITORING STATIONS |  | 2 ft |
|  | PROPOSED SCOUR MONITORING LOCATION |  | 3 ft |
|  | -2 ft |  | 4 ft |

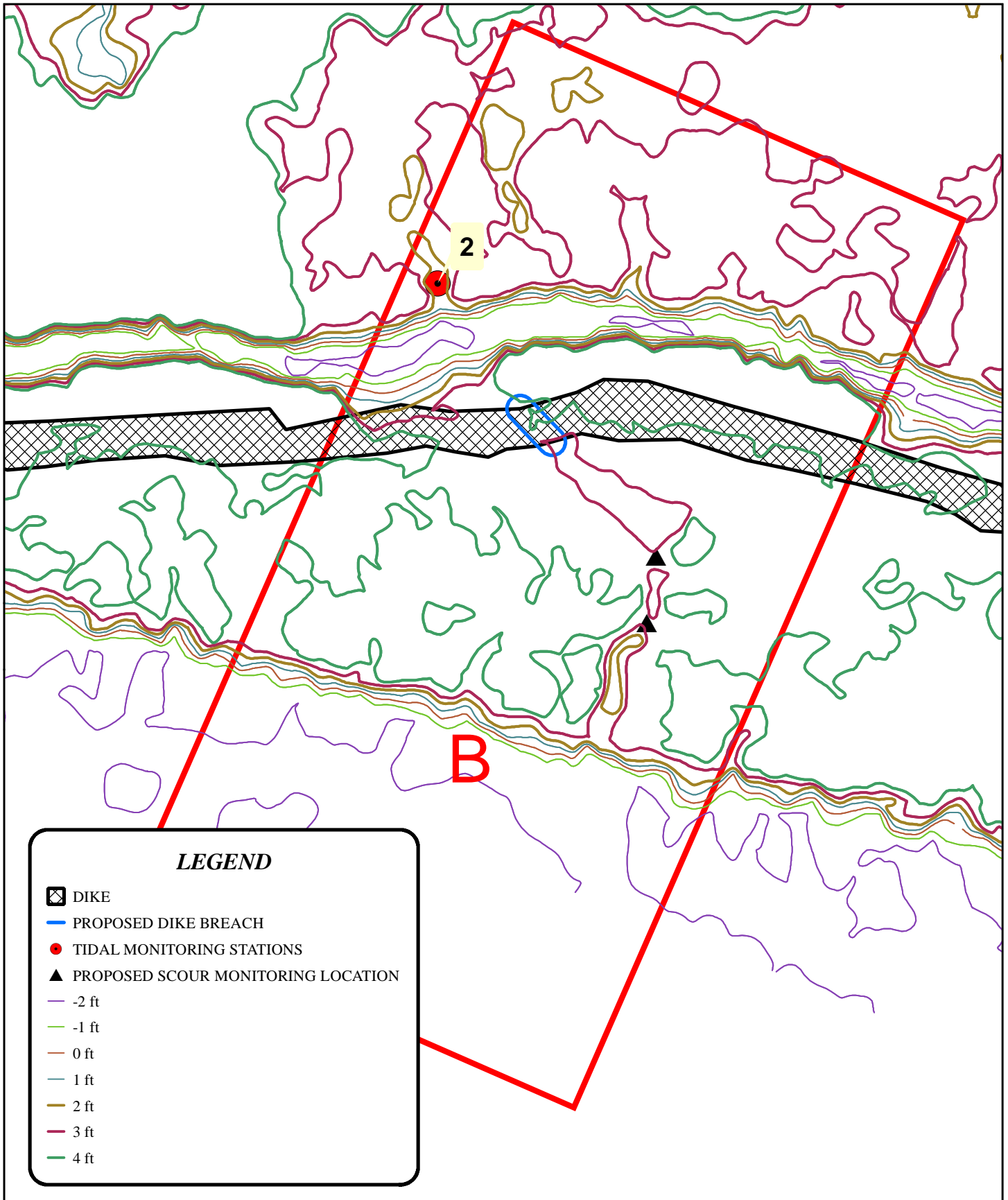
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**APPENDIX B-1
 CHANNEL AND SCOUR DETAIL
 PERFORMANCE CRITERIA AND
 MONITORING PLAN - NRDA
 CHARLESTON COUNTY, SC**

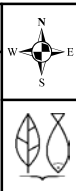
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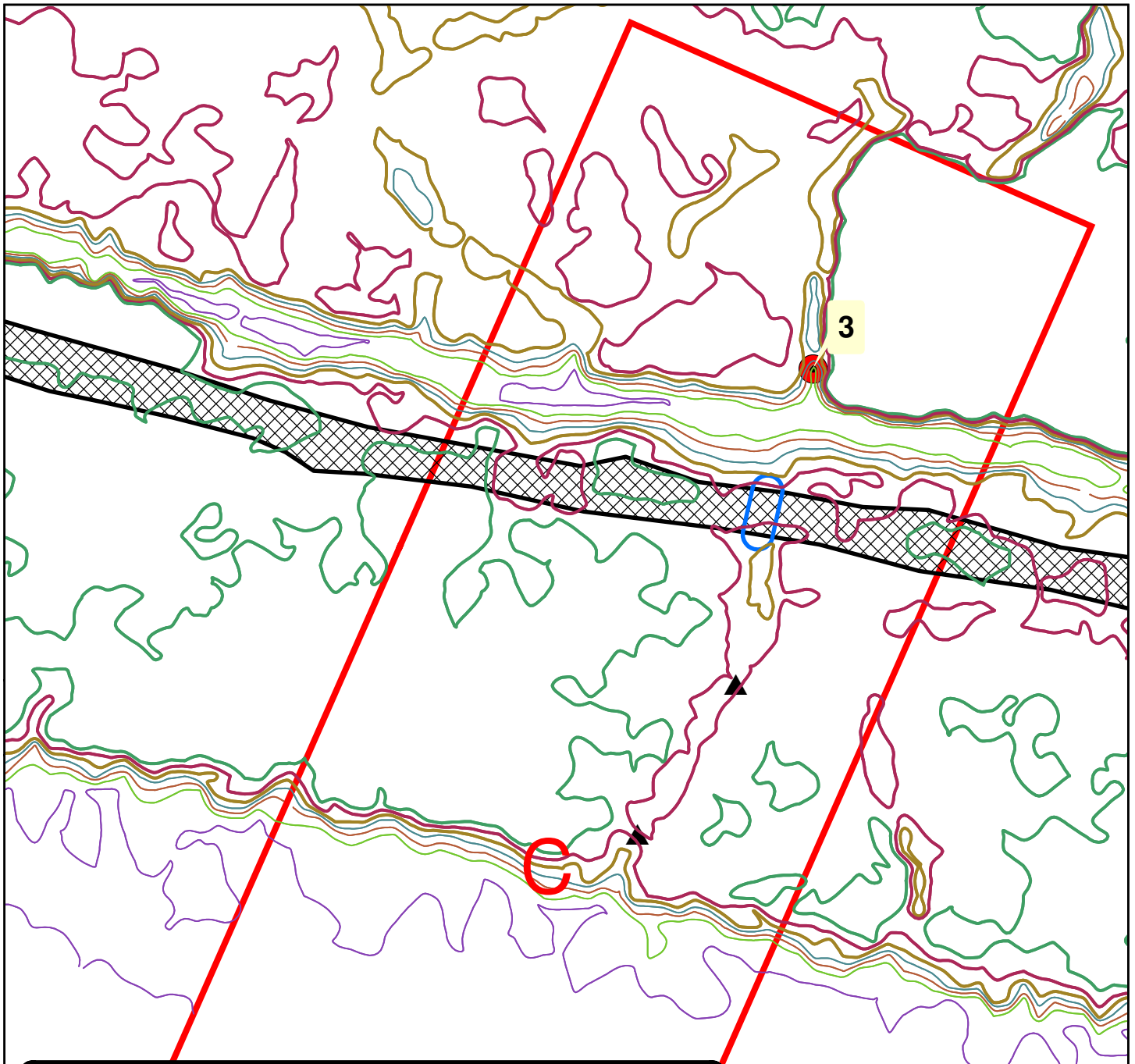
- DIKE
- PROPOSED DIKE BREACH
- TIDAL MONITORING STATIONS
- PROPOSED SCOUR MONITORING LOCATION
- 2 ft
- 1 ft
- 0 ft
- 1 ft
- 2 ft
- 3 ft
- 4 ft

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**APPENDIX B-2
 CHANNEL AND SCOUR DETAIL
 PERFORMANCE CRITERIA AND
 MONITORING PLAN - NRDA
 CHARLESTON COUNTY, SC**

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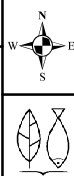


LEGEND

| | |
|-----------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|
|  DIKE |  -1 ft |
|  PROPOSED DIKE BREACH |  0 ft |
|  PROPOSED DIKE BREACHES & CHANNEL DETAIL |  1 ft |
|  TIDAL MONITORING STATIONS |  2 ft |
|  PROPOSED SCOUR MONITORING LOCATION |  3 ft |
|  -2 ft |  4 ft |

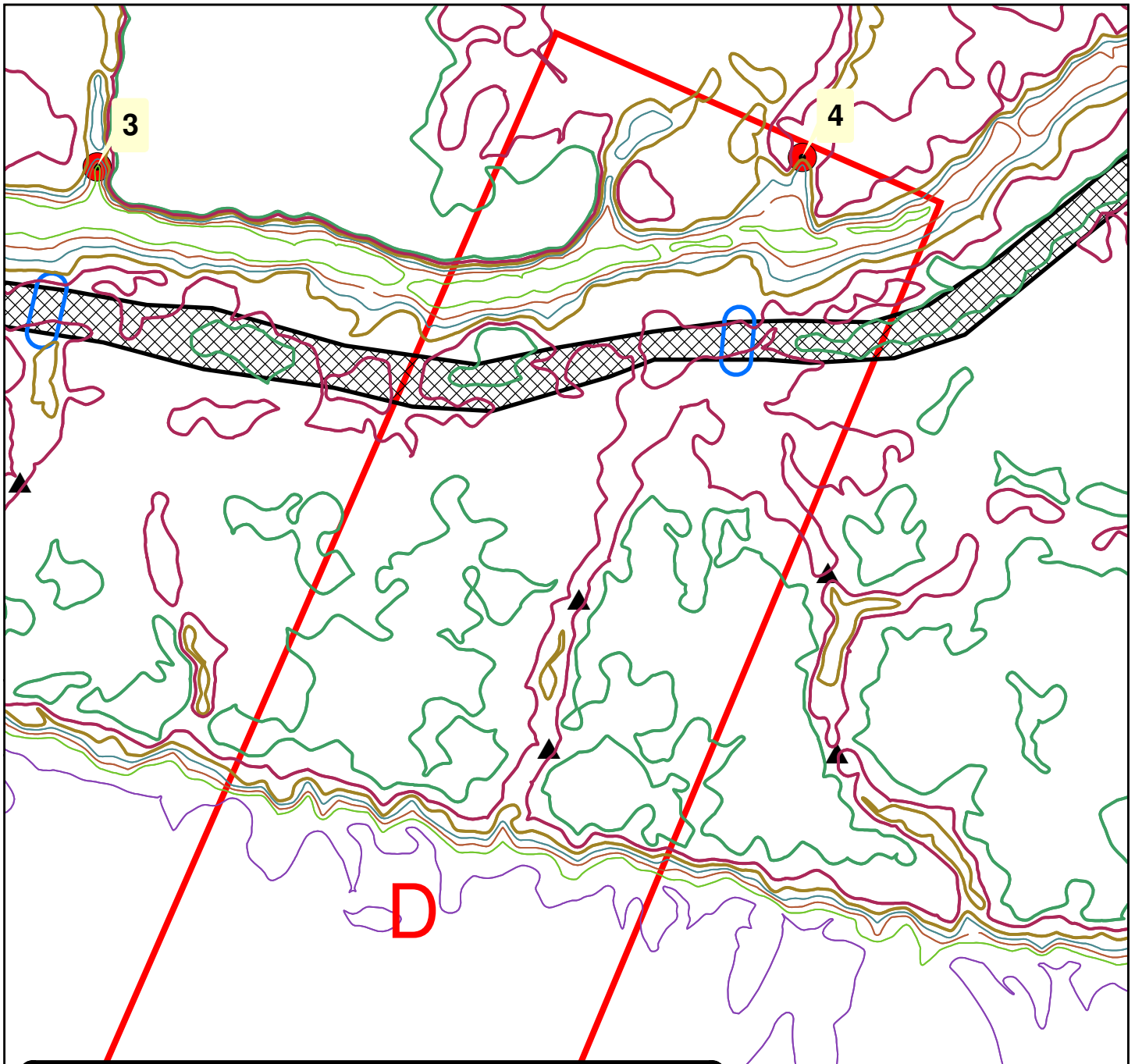
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APPENDIX B-3
CHANNEL AND SCOUR DETAIL
PERFORMANCE CRITERIA AND
MONITORING PLAN - NRDA
CHARLESTON COUNTY, SC

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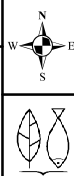


LEGEND

| | |
|-----------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------|
|  DIKE |  -1 ft |
|  PROPOSED DIKE BREACH |  0 ft |
|  PROPOSED DIKE BREACHES & CHANNEL DETAIL |  1 ft |
|  TIDAL MONITORING STATIONS |  2 ft |
|  PROPOSED SCOUR MONITORING LOCATION |  3 ft |
|  -2 ft |  4 ft |

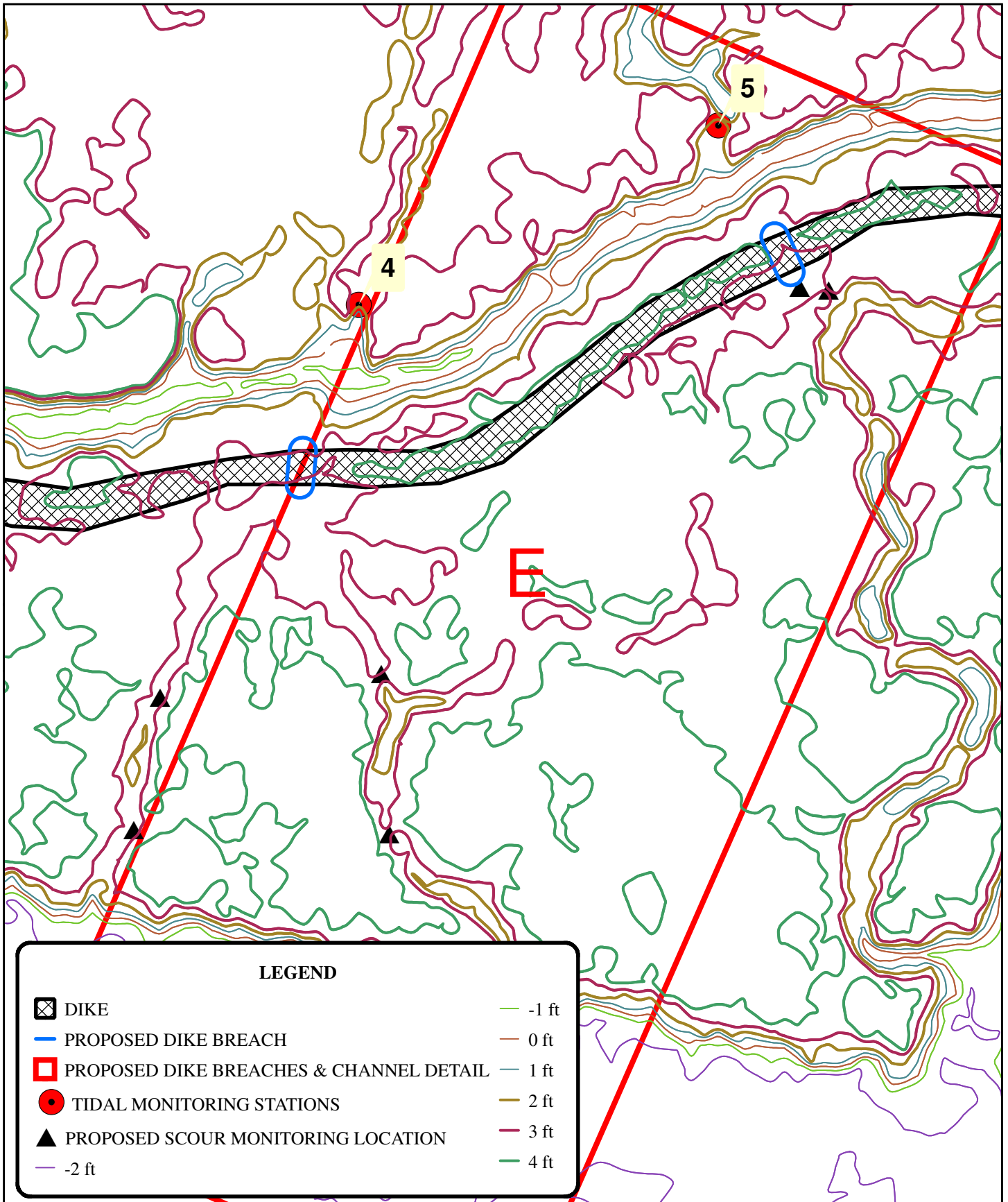
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APPENDIX B-4
CHANNEL AND SCOUR DETAIL
PERFORMANCE CRITERIA AND
MONITORING PLAN - NRDA
CHARLESTON COUNTY, SC

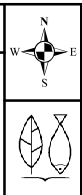
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LEGEND

| | | | |
|--|-----------------------------------------|--|-------|
| | DIKE | | -1 ft |
| | PROPOSED DIKE BREACH | | 0 ft |
| | PROPOSED DIKE BREACHES & CHANNEL DETAIL | | 1 ft |
| | TIDAL MONITORING STATIONS | | 2 ft |
| | PROPOSED SCOUR MONITORING LOCATION | | 3 ft |
| | -2 ft | | 4 ft |

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**APPENDIX B-5
 CHANNEL AND SCOUR DETAIL
 PERFORMANCE CRITERIA AND
 MONITORING PLAN - NRDA
 CHARLESTON COUNTY, SC**

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Appendix 3 to
Drayton Hall Statement of Work

| | A | B | C | D | E | F | G | H | I |
|----|--------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | | | | Method | Pre-Construction Monitoring | Post-Construction Monitoring (30 days) | Annual Monitoring (@+12, +24, +36 months) | Performance Criteria | Corrective Action |
| 2 | Tidal Monitoring | Parameter | Tidal Monitoring Stations (Appendix A-1) | One set of five monitoring stations will be placed parallel to the existing dike in the historical creek. See 3.2.1 | Two 48 hour monitoring events to be recorded. One event to take place during spring tide, one event to take place during average high tide. Data to be recorded every five minutes. See 3.2.5.1.1 | Two 48 hour monitoring events to be recorded under normal tide cycles. Data to be recorded every five minutes. See 3.2.5.2 | Two 48 hour monitoring periods to be annually recorded. One event to take place during spring tide. One event to take place during average high tide. Data recorded every five minutes. See 3.2.5.3.1 | N/A | Corrective Action may include, but not be limited to, dredging the tidal creek channel(s) or the installation of water control structures. Beazer will perform and document annual WSE monitoring for (but no longer than) 36 months. See 3.5.1. |
| 3 | | | | The other set of monitoring stations will be placed between the dike and the upland edge of the marsh. See 3.2.1 | | | | | |
| 4 | | | | 1 reference site located outside the diked area. See 3.2.1 | | | | | |
| 5 | | Water Surface Elevation (WSE) Monitoring Stations (Appendix A-2) | 1 site located in the interior marsh between breach B and C. See 3.2.1 | | | | | | |
| 6 | | 1 site located in marsh on Ashley River side of dike, directly opposite interior site, spaced the same distance from the dike. See 3.2.1 | | | | | | | |
| 7 | | | | | | | | | |
| 8 | | | | Method | Pre-Construction Monitoring | Post-Construction Monitoring (30 days) | Annual Monitoring (@+12, +24, +36 months) | Performance Criteria | Corrective Action |
| 9 | Vegetation | Parameter | Vegetation - Macro | Survey of species composition of entire 67 acre site through remote sensing and pedestrian survey. See 3.2.2 | Imagery and pedestrian surveys completed 60 days prior to construction. See 3.2.5.1.2 | No monitoring to be done at 30 days. | Imagery and pedestrian survey completed annually. See 3.2.5.3.2 | Reduction of Phragmites stands to less than one contiguous acre throughout entire 67 acre impoundment. See 3.4.2 | If criterion for success is not met Beazer will spot treat areas greater than one acre a third time. Beazer will not guarantee results and the corrective action will be satisfied by this third application. See 3.5.2 |
| 10 | | | Vegetation - Disturbed Construction Areas | Vegetation Sampling- Areas will be surveyed in one, 1-m ² quadrat randomly located within the grids. To facilitate specimen counts, quadrats will be subdivided into 25, 0.04-m ² sub-quadrats. A sample of three randomly selected sub-quadrats will then be surveyed to provide count and density estimates. Stem counts, average height, and % cover by species will be recorded. See 3.2.3.1 and 3.2.3.3 | A reference site will be established and surveyed. See 3.2.5.1.2 | No monitoring to be done at 30 days. | Monitoring will be completed at 12, 24, and 36 month intervals. See 3.2.5.3.2.2 | Stem densities in the replanted areas equal to or greater than 75% of that in the identified reference site at the end of three years. See 3.4.3. | If either the plant survival or stem density criterion is not met within the appropriate timeframe, Corrective Action may include but not be limited to replanting to achieve the target survival and stem density and/or amending the sediments or soils with organic material or slow-release inorganic fertilizer. Beazer will continue to submit annual reports during this time period but will not perform additional corrective actions at the end of the three-year monitoring period. See 3.5.3. |
| 11 | | Survival Sampling- A sampling grid will be established within each of the replanted areas. During each survival inspection, a 1-m ² quadrat will be randomly placed within each of the sampling grids. The number of stems per species will be counted within each quadrat. See 3.2.3.2 | | Vegetation monitoring will be conducted to confirm that the areas impacted during construction were replanted with appropriate native vegetation on 2-3 foot centers. See 3.2.5.2 | Monitoring will be completed at 90, 180, and 365 day intervals. See 3.2.5.3.2.1. | Survival of at least 75% of the plants (planted on 2-3 foot centers) twelve months after planting. See 3.4.3. | | | |
| 12 | | | | | | | | | |
| 13 | | | | Method | Pre-Construction Monitoring | Post-Construction Monitoring (30 days) | Annual Monitoring (@+12, +24, +36 months) | Performance Criteria | Corrective Action |
| 14 | Channel Depth/Elevation | Parameter | Existing Channels- Depth/elevation channel at creeks between dike and Ashley River. | Depth/elevation of bottom of existing channels. Ten sites total, two sites in each of the 5 creeks. Located at the points with the shallowest water depths between the dike and the Ashley River. Measurements physically taken by registered surveyor. See 3.2.4 | Surveyor will locate ten sites identified by LIDAR and confirm depth/elevations 60 days prior to construction. See 3.2.5.1.3 | As-built measurements of the breach dimensions and contours of the channels will be collected by a registered surveyor. See 1.5.2 | A registered surveyor will measure the channel depth/elevation and contours at the channel monitoring stations and breach locations at 12, 24, and 36 months following construction activities. See 3.2.5.3.3 | Elevations at the channel monitoring points will have increased by no more than 0.5 feet (i.e. depth will have decreased by no more than 0.5 feet) at the end of three (3) years. See 3.4.4 | If at least three breach locations do not meet the success criteria detailed in Section 3.4.4, Beazer will present the Trustees with a corrective action to open the historical channels to the Ashley River and correspondingly extend the monitoring period for an additional three years. There will be no further corrective action at the end of that additional three-year monitoring period. See 3.5.4. |
| 15 | | | Breach Locations- Depth/elevation of bottom of channel. | Depth/elevation of bottom of channels at breach locations. Also includes measurement of breach dimensions and contours. Measurements physically taken by registered surveyor. See 3.2.4 | (Not Applicable) | | | | |

Appendix 4

Manatee Guidelines

To reduce potential construction-related impacts to the manatee to discountable and insignificant levels, the Service recommends implementing the *Standard Manatee Construction Conditions*, which are as follows:

The permittee will comply with the following manatee protection construction conditions:

- a. The permittee shall instruct all personnel associated with the project of the potential presence of manatees and the need to avoid collisions with manatees. All construction personnel must monitor water-related activities for the presence of manatee(s) during May 15 - October 15.
- b. The permittee shall advise all construction personnel that there are civil and criminal penalties for harming, harassing, or killing manatees which are protected under the Marine Mammal Protection Act of 1972 and the Endangered Species Act of 1973.
- c. Any siltation barriers used during the project shall be made of material in which manatees cannot become entangled and must be properly secured, and regularly monitored to avoid manatee entrapment.
- d. All vessels associated with the project shall operate at “no wake/idle” speeds at all times while in the construction area and while in water where the draft of the vessel provides less than a four-foot clearance from the bottom. All vessels will follow routes of deep water whenever possible.
- e. If manatee(s) are seen within 100 yards of the active construction area all appropriate precautions shall be implemented to ensure protection of the manatee. These precautions shall include the operation of all moving equipment no closer than 50 feet to a manatee. Operation of any equipment closer than 50 feet to a manatee shall necessitate immediate shutdown of that equipment. Activities will not resume until the manatee(s) has departed the project area of its own volition.
- f. Any collision with and/or injury to a manatee shall be reported immediately to Jim Valade of the U.S. Fish and Wildlife Service, North Florida Field Office, at (904) 731-3116.

U.S. et al. v. Beazer East, Inc.
Consent Decree Appendix B
Conservation Easement

STATE OF SOUTH CAROLINA)
) GRANT OF CONSERVATION EASEMENT
COUNTY OF CHARLESTON)

THIS GRANT OF CONSERVATION EASEMENT (hereinafter "Easement") is made this _____ day of _____, 2018, by the National Trust for Historic Preservation in the United States (hereinafter "**Grantor**"), having an address at The Watergate Office Building, 2600 Virginia Avenue, NW Suite 1100, Washington, DC 20037, in favor of the Lowcountry Land Trust, Inc. (hereinafter "**Grantee**"), a South Carolina charitable corporation and a publicly supported corporation organized and operated under §501(c)(3) of the Internal Revenue Code of 1986, as amended (hereinafter the "Code") and not a private foundation under Code §509, with a business address at 43 Wentworth Street, Charleston, SC 29401.

WHEREAS, **Grantor** is the sole owner in fee simple of certain real property known as the "Drayton Hall Marsh Tracts" containing approximately one hundred and four (104) acres (TMS #s 406-00-00-011, 406-00-00-039, and 406-00-00-040), more particularly described in Exhibits "A" and "B" attached hereto and incorporated herein by this reference, in Charleston County, South Carolina (collectively, the "**Protected Property**" as hereinafter defined); and

WHEREAS, the **Protected Property** possesses significant ecological and natural resources, open space and scenic value, and historic or cultural values of great importance to **Grantor**, to **Grantee** and to the people of South Carolina and this nation, the protection of which will yield significant public benefit; and

WHEREAS, the **Protected Property** lies within the more than 800,000 acres of the Cooper, Ashley, Wando, and Sea Islands ("CAWS") Basin Focus Area, featuring diverse ecosystems and a wealth of wildlife, all of which is the focus of a consortium of private landowners, conservation groups, and federal and state agencies, working to protect and enhance the region's natural resources and traditional agricultural and recreational uses; and

WHEREAS, the **Protected Property** lies more specifically within the Ashley River Initiative of the CAWS Basin Focus Area, which contains many historic plantation sites which are largely undeveloped and harbor important natural habitats including tidal, managed, and forested wetlands, as well as upland forests and agricultural areas, and also contain important historical and archeological sites; and

WHEREAS, the CAWS Focus Area of South Carolina, and the Ashley River Corridor in particular, has in recent years suffered a tremendous loss of critical ecosystems, scenic property, wetlands, natural forests, wildlife habitat, prime farm land and timber land, and other natural resources from increased industrial, commercial and residential development; and

WHEREAS, the **Protected Property** lies within the Ashley River Historic District, a 13-mile long registered historic district along the Ashley River and Ashley River Road, a region of unique natural beauty and rich history, listed in the National Register of Historic Places, and was designated one of the "11 Most Endangered Historic Places in America" by the **Grantor** in 1995; and

WHEREAS, the **Protected Property** has frontage along the Ashley River, which was designated a South Carolina Scenic River in June 1998, pursuant to S.C. Code Ann. 49-29-230(5), making it the first State Scenic River established in the Lowcountry due to its unique combination of natural resource value as a relatively undisturbed tidal ecosystem with a large diversity of natural habitats, and its historical significance, having numerous historic sites of regional and national importance; and

WHEREAS, the protection of the **Protected Property** through this Easement is consistent with the Ashley Scenic River Management Plan dated January 2003 which outlines the common vision of the community for future management of the river and its resources within the context of the South Carolina Scenic Rivers Program; and

WHEREAS, in 1974, **Grantor** purchased Drayton Hall, a National Historic Landmark and a National Trust Historic Site located at 3380 Ashley River Road, Charleston, SC 29414 (“**Drayton Hall**”) and across the Ashley River from the **Protected Property**. Drayton Hall is one of the finest surviving colonial houses in America, the oldest surviving example of Georgian Palladian architecture in the United States and one of the only pre-Revolutionary houses that remain in close to original condition today. The house and grounds of Drayton Hall encompass approximately one hundred twenty-five (125) acres on the west bank of the Ashley River including scenic river frontage of over 1,470 feet. Drayton Hall accommodates approximately sixty thousand (60,000) visitors annually. The **Protected Property**, on the eastern side of the Ashley River, was a part of the former holdings of the Drayton family that had come under different ownership. In order to protect the scenic views of the Ashley River looking eastward from Drayton Hall and to protect the cultural integrity and historic viewshed, **Grantor** launched its successful “Land Across the River” campaign to purchase the **Protected Property** in 1994; and

WHEREAS, this Easement furthers perpetual protection of the **Protected Property**, a requirement of the **DARP/EA for the Koppers Superfund Site** (as hereinafter defined) directed by the **Natural Resource Trustees** (as hereinafter defined), a consortium of federal and state agency representatives (the “Trustees”), for the purpose of mitigating the Natural Resources Damage claim against Koppers Company/Beazer East, Inc. (“**Beazer**” as hereinafter defined) for injury to the natural resources in the Ashley River due to hazardous waste contamination at the **Koppers Co, Inc. (Charleston Plant) Superfund Site** located on the Ashley River in Charleston, South Carolina; and

WHEREAS, the protection of the **Conservation Values** (as hereinafter defined) of the **Protected Property** will yield significant public benefits, as evidenced by its designation as a “Core Critical Area” (“area containing high densities of priority habitats for conservation management and protection”) by South Carolina conservation partners in the 1999 South Carolina Landscape Mapping Project; and

WHEREAS, the **Protected Property** will provide significant public benefits for the people of Charleston County as it is designated as a “Rural Priority Area” and “Resource Management Area”, which are specifically targeted areas for conservation under the Charleston County Comprehensive Greenbelt Plan, and is within a proposed riparian buffer zone under this plan; and

WHEREAS, the **Protected Property** is in proximity to other permanently protected lands including: Middleton Marsh I, approximately 81 acres and Lewis Tract, approximately 20 acres, both located upstream on the Ashley River, a portion of Millbrook Plantation, approximately 18 acres located upstream and across the Ashley River, and Ashley River Marshes 1-7, approximately 1,121 acres located downstream on Ashley River, all protected by Grantee; Carter Tract at Millbrook Plantation, approximately 1,432 acres, Hanahan Tract, approximately 1,056 acres, Poplar Grove, approximately 4,300 acres, and Uxbridge, approximately 700 acres, and Middleton Place Woodlands, approximately 5,800 acres, all protected by Wetlands America Trust, Inc.; Ashley River Road Buffers #1-5, approximately 11 acres, and Millbrook Plantation Farm, approximately 141 acres, both protected by Grantee; Charlestowne Landing, approximately 350 acres, managed and permanently protected by South Carolina Department of Parks and Tourism; Drayton Hall, approximately 125 acres protected by ownership by the Grantor; Drayton Hall Ashley River Road Buffer, approximately 15 acres protected by Grantor; Mateeba Estates Road Buffer, approximately 4 acres, Mateeba Estates Boat Landing, approximately 5 acres, protected by Grantee; and Old Dorchester State Park, approximately 189 acres protected by the South Carolina Department of Parks, Recreation and Tourism (“PRT”); and the portion of protected lands directly south of Drayton Hall proper, approximately 520 acres owned, managed and permanently protected by South Carolina PRT; and

WHEREAS, the **Protected Property** is situated on and prominently visible by the public from the Ashley River, having approximately 4,600 feet of primarily marshland river frontage with forested uplands; and

WHEREAS, the **Protected Property** has relatively natural habitats, comprised primarily of marshland and mixed upland forest, which support a variety of floral and faunal species; and

WHEREAS, in particular, the **Protected Property** in its existing relatively natural condition contributes very little nonpoint source pollution to the Ashley River due to the significant extent of native vegetation present as well as the absence of **Impervious Surface** that, taken together, reduces sources of pollution and nutrient loading; and

WHEREAS, the **Protected Property** contains passerine wetlands, prime habitat for migratory songbirds, colonial wading birds, and associated amphibian and reptile species; and

WHEREAS, the **Protected Property** provides a diversity, quality, and combination of natural habitats significant to wildlife habitat functions including feeding, nesting and roosting areas for migratory songbirds, ground-nesting birds, and also including feeding, breeding and resting areas for native small and large game and non-game mammals; and

WHEREAS, the **Protected Property** contains habitat with the potential to support species listed as priority species in the South Carolina State Comprehensive Wildlife Conservation Plan which have known or highly possible occurrences in Charleston County including but not limited to the northern cricket frog (*Acris crepitans*), frosted flatwoods salamander (*Ambystoma cingulatum*), eastern tiger salamander (*Ambystoma tigrinum*), spotted turtle (*Clemmys guttata*), star-nosed mole (*Condylura cristata*), Rafinesque's big-eared bat (*Corynorhinus rafinesquii*), black-throated green warbler (*Dendroica virens*), swallow-tailed kite (*Elanoides forficatus forficatus*), bald eagle (*Haliaeetus leucocephalus*), southeastern bat (*Myotis austroriparius*), eastern woodrat (*Neotoma floridana floridana*), eastern fox squirrel (*Sciurus niger*), and black swamp snake (*Seminatrix pygaea*); and

WHEREAS, it is anticipated that the **Restoration Project** (as hereinafter defined) conducted by **Beazer** and required by the **Natural Resource Trustees** will reestablish the historical hydrology of the intertidal saltmarsh area, thus enhancing the ecological services provided by the marsh habitats on the **Protected Property**.

WHEREAS, the specific **Conservation Values** are documented in a report on file at the **Grantee's** office and incorporated herein by this reference ("**Baseline Documentation Report**" as hereinafter defined), which consists of maps, reports and photographs (including 2006 NAPP Photos, 2011 NAIP Photos and on-site photographs taken by a representative of the **Grantee**), and the parties agree that the **Baseline Documentation Report** provides, collectively, an accurate representation of the **Protected Property** at the time of this Easement and is intended to serve as an objective point of reference from which **Grantee** shall monitor and enforce compliance with the terms of this Easement; and

WHEREAS, **Grantor** believes that through this Easement, the natural resources, habitat, beauty and unique ecological and historic character of the **Protected Property** can be protected in a manner that permits continuing private ownership of land and its continued use and enjoyment; and

WHEREAS, **Grantor** intends to preserve and protect the **Marsh Preserve** (as hereinafter defined) and the **Conservation Values**, in perpetuity; and

WHEREAS, **Grantor** is willing to forego forever the right to fully exploit the financial potential of the Protected Property by encumbering the **Protected Property** with this Easement as specified herein; and

WHEREAS, by act of the General Assembly of the State of South Carolina, as enacted in South Carolina Code Ann. (1976, as amended) (hereinafter the "SC Code") §27-8-10, et. seq. (The South Carolina Conservation Easement Act of 1991) (hereinafter the "Act"), South Carolina recognizes and authorizes the creation of conservation restrictions and easements; and

WHEREAS, this Easement contains certain conservation purposes pursuant to the Act, as outlined therein and stated below:

- (A) "retaining or protecting natural, scenic, or open-space aspects of real property";
- (B) "ensuring the availability of real property for agricultural, forest, recreational, educational, or open-space use";
- (C) "protecting natural resources";
- (D) "maintaining or enhancing air or water quality";
- (E) "preserving the historical, architectural, archaeological, or cultural aspects of real property".

WHEREAS, **Grantor** and **Grantee** recognize the natural, scenic, aesthetic, and special character and opportunity for enhancement of the **Protected Property**, and have the common purpose of the conservation and protection in perpetuity of the **Protected Property** consistent with the Internal Revenue Code (the "Code") §170(h)

and in the regulations promulgated thereunder by the United States Department of the Treasury (hereinafter “Treasury Regulations”), except for the compensation received by **Grantor**, as follows:

(I) Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem within the meaning of Code §170(h)(4)(A)(ii) which will yield a significant public benefit, including the protection of habitats and water quality and the public benefits described in the recitals to this Easement; and

(II) Preservation of open space (including farmland and forest land) within the meaning of Code §170(h)(4)(A)(iii)(I) for the scenic enjoyment of the general public which will yield a significant public benefit, including the opportunities for scenic enjoyment and the public benefits described in the recitals to this Easement; and

(III) Preservation of open space (including farmland and forest land) within the meaning of Code §170(h)(4)(A)(iii)(II) pursuant to clearly delineated Federal, state, or local governmental conservation policies which will yield a significant public benefit, including the policies and public benefits described in the recitals to this Easement; and

(IV) Preservation of a historically important land area within the meaning of Code §170(h)(4)(A)(iv) which will yield significant public benefit, including the area(s) and public benefits described in the recitals to this Easement.

WHEREAS, **Grantor** and **Grantee** agree these purposes can be accomplished by voluntarily placing perpetual restrictions upon the use of the **Protected Property** and by providing for the transfer from the **Grantor** to the **Grantee** of affirmative rights for the protection of the Protected Property so as to be consistent with the requirements of a “qualified conservation contribution” as such term is defined in Code §170(h) and the Treasury Regulations promulgated thereunder; and

WHEREAS, the **Grantee** is a corporation of which its purposes and powers include one or more of the purposes set forth in SC Code §27-8-20(1); and **Grantee** is a holder of conservation easements as conservation easements are defined by the Act; and, **Grantee** is a publicly supported, tax-exempt, nonprofit corporation organized and operated under Code §501(c)(3) dedicated to the preservation of the irreplaceable natural and historical resources of the South Carolina Lowcountry landscape by protecting significant lands, waters and vistas and is not a private foundation under Code §509;

NOW, THEREFORE, in consideration of the above and a monetary payment from **Beazer** to the **Grantor**, and in further consideration of the mutual covenants, terms, conditions and restrictions contained herein, and pursuant to §§170(h) and 2031(c) of the Code and pursuant to the laws of the State of South Carolina, the **Grantor** hereby voluntarily grants and conveys to **Grantee** this Easement in perpetuity over the **Protected Property** of the nature and character and to the extent hereinafter set forth. **Grantor** herein declares that the **Protected Property** shall be held, transferred, sold, conveyed and occupied subject to the covenants, conditions, and restrictions hereinafter set forth, which covenants, conditions, and restrictions shall be deemed to run with the land in perpetuity and to be a burden on the **Protected Property in perpetuity**.

1. **Purpose.** The Purpose of this Easement is to ensure that the **Protected Property** will be retained in perpetuity predominantly in its relatively natural and scenic condition, as improved by the **Restoration Project** (as hereinafter defined), and to prohibit uses of the **Protected Property** that would significantly impair or interfere with the **Conservation Values** of the **Protected Property**, or substantially impair the **Restoration Project** required by the **Natural Resource Trustees**, while reserving to **Grantor** all uses not expressly prohibited by this Easement, including, without limitation, limited low-impact educational, recreational, agricultural, forestry, and other open-space uses of the **Protected Property** that are compatible with and not destructive of the **Conservation Values** or the **Restoration Project**, and all educational uses involving the history, ecology, conservation, historic preservation and archeology of the region. **Grantor** understands that nothing in this Easement relieves **Grantor** of any obligation or restriction on the use of the **Protected Property** imposed by law. The protection of these **Conservation Values** by stewardship, enforcement, and monitoring in perpetuity is set forth in this Easement.

2. **Rights of Grantee.** Grantor hereby conveys the following rights to the Grantee:

(A) **Right of Visual Access.** To have visual access to the **Protected Property**, provided that such right shall not be construed to permit general public access over or upon the **Protected Property**;

(B) **Right to Monitor.** To enter upon the **Protected Property** in a reasonable manner, at reasonable times, with at least five (5) business days' prior notice, in order to monitor compliance with this Easement and to further document natural and manmade features of the **Protected Property**. The Grantee shall limit entry to annual visits (after completion of the **Baseline Documentation Report**) unless the Grantee has reason to believe there is a violation of the terms of this Easement. Grantee shall not unreasonably interfere with Grantor's quiet use and enjoyment of the **Protected Property**;

(C) **Right to Prevent Inconsistent Uses.** To prevent Grantor or third parties from conducting any activity or use inconsistent with the Purpose;

(D) **Right to Require Restoration.** To require Grantor to restore such **Conservation Values** that may be damaged by any uses or activities prohibited by this Easement conducted by or on behalf of Grantor, or any activity or use inconsistent with the Purpose to include third party activities conducted by or on behalf of the Grantor. Provided, however, this right of Grantee shall not include a requirement that Grantor restore or maintain any impairment of the **Restoration Project** required by the **Natural Resource Trustees** or any impairment of **Conservation Values** resulting from activities described in Paragraph 12 below.

3. **Definitions.** For the purposes of this Easement, Grantor and Grantee agree that those bold-faced terms that appear throughout this Easement shall be defined as follows:

Agricultural Activities shall be defined as activities outside of the **Marsh Preserve** directly related to the production of plant or animal products on the **Protected Property**, including crop production, animal husbandry, floriculture and horticulture, in a manner that preserves the long-term productivity of the soil, and protects water quality in the Ashley River and adjacent marshes, including the Marsh Preserve. Permitted **Agricultural Activities** shall not include **Feedlots**, intensive livestock production facilities nor any type of large-scale operation where animals are confined. Notwithstanding the above, aquaculture and/or mariculture activities must have **Approval**.

Agricultural Structure shall be defined as any building designed to be used or currently used in conjunction with permitted **Agricultural Activities** or **Forest Management Practices**, not including any structure used as a dwelling for human beings.

Approval shall be defined as the prior written consent of the Grantee to permit Grantor to exercise certain rights described in Paragraphs 4 and 5, or to undertake any activity otherwise permitted through Discretionary Consent as described in Paragraph 9. The rationale for requiring the Grantor to receive **Approval** is to afford Grantee an adequate opportunity to evaluate the proposed activities to confirm if they are designed and will be carried out in a manner that is not inconsistent with the Purpose of this Easement. **Approval** shall not be unreasonably withheld by the Grantee. **Approval** does not relieve Grantor of the obligation to obtain all other necessary permits, consents and approvals.

Ashley River Buffer shall be defined as that portion of the **Protected Property** outside of the **Marsh Preserve** but within three hundred (300) feet of the **Water Line** adjacent to the Ashley River and its tributaries and as further described in Exhibit "B" hereto and in the **Baseline Documentation Report**.

Baseline Documentation Report shall be defined as the maps, reports and photographs (including 2006 NAPP Photos, 2011 NAIP Photos and on-site photographs taken by a representative of the Grantee), which provide, collectively, an accurate representation of the **Protected Property** at the time of this Easement and is intended to serve as an objective point of reference from which Grantee shall monitor and enforce compliance with the terms of this Easement.

Beazer shall mean Koppers Co./Beazer East, Inc., and any of its successors and assigns to the requirements of the Consent Decree between Beazer East, Inc., and the **Natural Resource Trustees** resolving natural resource damages liability at the **Koppers Co., Inc. (Charleston Plant) Superfund Site** in Charleston, South Carolina.

Boardwalk shall be defined as a pedestrian walkway constructed of boards or planks elevated above water or tidal wetlands.

Boatshed shall be defined as a non-climate-controlled structure used for the storage of non-motorized boats and equipment.

Building Height shall be measured, for the purposes of any permitted structure, from ground elevation or the legal building elevation within a Federal Emergency Management Agency (or successor agency) flood zone, whichever is greater, to the top of the highest structural component, excluding chimneys, antennas and weather vanes.

Caretaker Residential Structure shall be defined as a dwelling having sleeping quarters, sanitary facilities, and cooking facilities which provides habitable accommodations for the management or security of the Protected Property by the **Grantor** or permitted lessee, but shall not be used as a permanent private residence.

Conservation Values shall be defined as and include: Open space outside of the **Marsh Preserve** for agriculture and/or forestry use; relatively natural habitat and biological diversity; preservation or enhancement of downstream water quality of the Ashley River; scenic views of the **Protected Property** from the Ashley River and from **Drayton Hall**.

DARP/EA for the Koppers Superfund Site shall mean the Damage Assessment and Restoration Plan/Environmental Assessment prepared pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act and National Environmental Policy Act to identify and evaluate damages to natural resources at the **Koppers Co, Inc. (Charleston Plant) Superfund Site** as well as restoration alternatives intended to compensate the public for the damages, and to analyze the impacts to the human environment associated with the alternatives being considered for restoration of the damaged natural resources.

Education/Recreation Structure shall be defined as any structure designed or utilized for educational and/or recreational uses related to the non-profit use of the **Protected Property** as designated herein, or other uses subject to **Approval** including, but not limited to: pavilions, covered shelters, outdoor classrooms, picnic areas, kiosks, equipment sheds, and restroom facilities. **Education/Recreation Structure** shall not include any structure used as a permanent or temporary **Caretaker Residential Structure**.

Feedlot shall be defined as any confined area or facility for feeding livestock for commercial purposes, or within which the land is not grazed or cropped at least annually, or which is used to receive livestock that have been raised off the **Protected Property** for feeding and fattening for market.

Forest Management Plan shall be defined as a written plan subject to periodic updates mutually agreed to by the parties, to be on file with the **Grantee**, which outlines **Forest Management Practices** on the Protected Property.

Forest Management Practices shall be defined as the production, improvement and maintenance of forestlands for timber production and commercial harvesting, wildlife management, aesthetics or any other purpose. **Forest Management Practices** include silvicultural practices, which are used to control the establishment, growth, composition, health, quality and utilization of forestlands for multiple-use purposes and include, but are not limited to, harvesting, thinning, reforestation, competition control, prescribed fire or fire breaks.

Grantee shall be defined as the Lowcountry Land Trust, Inc., a §501(c)(3) South Carolina charitable corporation, designated as the holder of this Easement, and its successors and assigns.

Grantor shall be defined as the National Trust for Historic Preservation in the United States, the original donor of this Easement, and its personal representatives, heirs, successors, assigns, and subsequent owners of record.

Impervious Surface shall be defined as a hard surface area that either prevents or significantly retards the entry of water into the soil mantle at a rate lower than that present under natural conditions prior to development. Impervious surfaces can include, but are not limited to, roof tops, walkways, patios and decking, enclosed and unenclosed porches, paved driveways, paved parking lots, covered storage areas, concrete or asphalt paving, swimming pools, or other surfaces which similarly impede the natural infiltration of surface and stormwater runoff. **Impervious Surface** specifically excludes ground surfaces covered with sand, gravel, shell sand, crushed stone, or other similar traditional permeable materials. The use, installation, and/or introduction of new products and/or technologies for pervious surfaces (those surfaces which allow for the direct percolation of water into the soil surface), requires prior **Approval** from the **Grantee**. **Approval** will be case by case and all requests for the use, installation and/or introduction of such new products and/or technologies must be accompanied by the appropriate research, data and information on the material for **Grantee** to accurately evaluate the proposed product and/or technology.

Koppers Co, Inc. (Charleston Plant) Superfund Site shall mean the land encompassing approximately 102 acres, located south of Milford Street between King Street and Ashley River, in Charleston, Charleston County, South Carolina, and as described in the April 29, 1998 EPA Superfund Record of Decision.

Marsh Preserve shall mean that portion of the **Protected Property** where the **Restoration Project** shall take place to restore the natural tidal marsh habitat as required by the **Natural Resource Trustees**, encompassing approximately 70 acres and as further described in the **DARP/EA for the Koppers Superfund Site**, in Exhibit "B" hereto and in the **Baseline Documentation Report**.

Natural Resource Trustees shall mean the United States National Oceanic and Atmospheric Administration, the United States Fish and Wildlife Service, the South Carolina Department of Natural Resources and the South Carolina Department of Health and Environmental Control. Natural Resource Trustees are authorized under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq. (also known as the Clean Water Act or CWA), and other applicable federal or state laws, including Subpart G of the National Oil and Hazardous Substances Contingency Plan (NCP), at 40 C.F.R. §§ 300.600 through 300.615, and DOI's CERCLA NRDA regulations at 43 C.F.R. Part 11 (NRDA regulations) which provide guidance for this restoration planning process under CERCLA. Under these regulations, the Trustees are responsible for recovering damages for injury to natural resources caused by a release of hazardous substances.

Notice shall be defined as a written communication to include confirmed receipt, not a request for **Approval**, prior to undertaking a permitted activity, as defined in Paragraph 21.

Protected Property shall mean certain real property owned by **Grantor** in Charleston County, South Carolina, and comprising approximately one hundred and four (104) acres in three separate parcels (TMS #s 406-00-00-011, 406-00-00-039, and 406-00-00-040), more particularly described in Exhibits "A" and "B" attached hereto, and incorporated herein by this reference.

Request for Approval shall be defined as a written request by **Grantor** for **Approval** by **Grantee** of a defined activity proposed by the **Grantor**.

Restoration Project shall be defined as those specific marsh restoration and other mitigation activities required by the **Natural Resource Trustees** for the **DARP/EA for the Koppers Superfund Site**,

and further described in the **Statement of Work** (as hereinafter defined), that are to be conducted by **Beazer**. Work pursuant to the **Restoration Project** shall occur in the **Marsh Preserve**.

Statement of Work shall be defined as the written work plan titled “Drayton Hall Restoration Project Statement of Work”, and included as an appendix to a court-approved consent decree resolving **Beazer**’s potential liability to the **Natural Resource Trustees** for Natural Resource Damages at the **Koppers Co., Inc. (Charleston Plant) Superfund Site** in Charleston, South Carolina.

Significant Tree shall be defined as any cypress, live oak, magnolia or hickory or any tree having a diameter at breast height of twelve (12) inches or greater.

Subdivided Tract shall be defined as a legally divided, transferable parcel of land having a unique tax identification number according to Charleston County real property tax records.

Subdivision shall be defined as the permitted creation of a **Subdivided Tract** after the date of this Easement.

Superstructures shall be defined as any structure that extends above the level of the walkway, pierhead or float of a dock, specifically excluding railings. **Superstructures** may include, but are not limited to roofs, benches, tables, shelves and counters.

Water Line shall be defined as the edge of a waterway or waterbody which is either the critical line as defined by South Carolina Office of Ocean and Coastal Resource Management or, if no critical line has been established, the mean high water line as defined by the United States Army Corps of Engineers or established by a surveyor employing the regulatory standards then in effect for its determination. If the critical line or the mean high water line cannot be established or are no longer used to define the edge of a waterway or waterbody, then the comparable defining line as defined by successor entities of the above named agencies shall be used.

Wetlands shall be defined as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions,” as stated in the United States Army Corps of Engineers Wetlands Delineation Manual (1987, or as amended).

4. **Reserved Rights.** **Grantor** reserves all the rights, uses and activities on, over, or under the **Protected Property** that are not expressly prohibited by this Easement (collectively, the “Reserved Rights”), subject to the specific Restrictions and Limitations of Paragraph 5 (as applicable), including, without limitation, the following:

- (A) All rights, uses, and activities inherent in fee simple ownership of the **Protected Property** in its entirety;
- (B) The right to permit **Beazer** to undertake all those activities, actions and uses described in the **Statement of Work** or otherwise required to complete the **Restoration Project**;
- (C) The right to permit entry on the **Protected Property** by the **Natural Resource Trustees** or their designees to monitor the **Restoration Project**; and
- (D) The right to engage in low impact educational and outdoor recreational activities including hiking, wildlife observation, boating or other activities that do not impair the **Conservation Values** of the **Protected Property**.

In addition, the exercise of all Reserved Rights shall be in full accordance with all applicable local, state and federal laws and regulations, as well as in accordance with the Purpose of this Easement stated in Paragraph 1. No **Approval** shall be needed from **Grantee** for **Grantor** to exercise the Reserved Rights.

5. **Restrictions and Limitations.** **Grantor** will not perform or permit or will perform or permit, as specified below, the following acts or uses on, over or under the **Protected Property**:

(A) **Subdivision.** The **Protected Property** is currently composed of three (3) tracts, which are Charleston County TMS #s 406-00-00-011, 406-00-00-039 and 406-00-00-040. There shall be no further **Subdivision** of the **Protected Property**. Although the current legal description of the **Protected Property** describes more than one tract of land, which could be conveyed separately, the **Grantor** covenants and agrees that all of the **Protected Property** shall be held by the same owner as a single undivided tract of land. The property boundaries of the three (3) tracts may be reconfigured at the **Grantor's** discretion in a manner not to exceed three (3) separate tracts, however, the tracts shall be held by the same owner as a single undivided tract of land. The **Grantor** shall not indirectly or practically divide all or any part of the **Protected Property** through the allocation of property rights among partners, shareholders or members of any successor entity, the creation of a horizontal property regime, long-term leasing or any other means.

(B) **Structural Limitations.** The construction, enlargement, removal and replacement of **Education/Recreation Structure, Caretaker Residential Structure, Agricultural Structures** and all other structures shall be permitted, provided they are subject to the following limitations:

I. Total **Impervious Surface** on the **Protected Property** shall not exceed a maximum of nine thousand, four hundred (9,400) square feet in the aggregate.

II. No **Education/Recreation Structure, Caretaker Residential Structure** or **Agricultural Structure** shall exceed thirty-five (35) feet in **Building Height**.

III. The **Caretaker Residential Structure** shall be limited to one (1) such structure which shall not exceed one thousand (1,000) square feet.

IV. The **Boatshed** shall be limited to one (1) such structure as defined herein, shall not exceed six hundred (600) square feet, shall not exceed twenty (20) feet in **Building Height**, and shall not be climate controlled.

V. **Education/Recreation Structures** and **Agricultural Structures** shall be permitted, provided that the square footage of all **Impervious Surface** on the **Protected Property** does not exceed the allowance stated in Paragraph 5(B)(I).

VI. Other than the permitted **Caretaker Residential Structure**, no other structure on the **Protected Property** shall be used as a temporary or permanent dwelling for human beings.

VII. **Docks.**

(a) One (1) new dock providing access to the Ashley River or its tributaries may be constructed, maintained, repaired, improved, removed or replaced, provided it shall be limited to primarily natural or non-reflective materials, limited to one (1) walkway no more than six (6) feet wide, and limited to one (1) fixed pierhead with a maximum of one hundred sixty (160) square feet in the aggregate. The dock may also have one (1) drive-on or float-on type of floating dry dock limited to one hundred (100) square feet.

(b) **Grantor** shall not construct as a part of any dock providing access to the Ashley River or its tributaries any fixed or permanent **Superstructures** or boatlifts.

Neither **Grantor** nor **Grantor's** agents shall make application for any permit or construct any improvements on the **Protected Property** or allow any third party to make application for any permit or construct any improvements on the **Protected Property** or allow access from the **Protected Property** to any improvements which would result in a violation of any provisions of this Easement, including, but not limited to, the construction of any docks within the deemed extension of the property lines extending to the Ashley River except as expressly permitted, herein.

VIII. Boat Ramp. No boat-launching ramp(s) providing access to the Ashley River are permitted.

IX. Ashley River Marsh Pier. A **Boardwalk** providing access to the **Marsh Preserve** may be constructed, maintained, repaired, improved, removed or replaced, provided it shall be limited to primarily natural or non-reflective materials, shall be limited to a total length of six hundred (600) feet, the walkway of no wider than six (6) feet, and an optional associated observation platform that does not exceed a maximum of two hundred (200) square feet in the aggregate (the “Ashley River Marsh Pier”). The observation platform shall be constructed at the same height as the **Boardwalk**. There shall be minimal adverse impact to the **Marsh Preserve** during construction. All structures and construction activities shall be consistent with applicable South Carolina Department of Health and Environmental Control’s Ocean and Coastal Resource Management regulations.

X. Upland and Marshland Boardwalks. **Boardwalks** providing access to the **Protected Property** may be constructed, maintained, repaired, improved, removed or replaced, provided they shall be limited to primarily natural or non-reflective materials, limited to no more than six (6) feet in width, and limited to walkways and associated observation platforms with a maximum of two thousand two hundred (2,200) feet in length. There shall be minimal adverse impact to **Wetlands** during construction. All structures and construction activities shall be consistent with applicable South Carolina Department of Health and Environmental Control’s Ocean and Coastal Resource Management regulations.

XI. Towers. There shall be no towers on the **Protected Property**, including, but not limited to, radio, microwave, broadcast, communication and cellular towers. Notwithstanding the above, **Grantor** retains the right to construct, maintain, improve, repair and replace three (3) scientific and/or educational observation towers, all of which shall not individually exceed twenty-five (25) feet in height inclusive of handrails. No more than one (1) observation tower shall be located in the **Ashley River Buffer**. All observation towers shall be limited to primarily natural or non-reflective materials that blend with the natural environment.

(C) Limitations in the Ashley River Buffer. In order to provide an aesthetic and ecological transition zone between permitted structures and waterways (or roadways), there shall be no **Impervious Surface**, **Agricultural Activities**, structures (other than fencing and gates, existing utility and service lines for any permitted use under this Easement, the permitted dock, the permitted **Boatshed**, permitted **Boardwalks** and the permitted observation tower), fuel storage tanks, nor new roads (with the exception of one (1) new pervious road to the permitted **Boatshed**) in the **Ashley River Buffer**. **Grantor** reserves the right to cut any tree, in accordance with applicable governmental laws and regulations, when it is necessary to salvage timber damaged by natural causes, when cutting is necessary to prevent further such damage or personal injury, or when a permitted structure is in danger and to engage in **Forest Management Practices** in the **Ashley River Buffer**, provided there shall be no clearcutting, no cutting or otherwise destroying **Significant Trees** without **Approval**. **Grantor** reserves the right to create and maintain trails and **Boardwalks** within the **Ashley River Buffer** area as permitted in Paragraph 5(B)(X). The **Ashley River Buffer** shall be subject to the following additional restrictions:

(D) Limitations in the Marsh Preserve. There shall be no structures (other than the permitted dock, the permitted Ashley River Marsh Pier and associated platform, the permitted **Boardwalks**, and the existing utility and service lines), fuel storage tanks, **Impervious Surface**, road, material adverse alteration to the topography or hydrology other than as necessary to further the **Restoration Project**, **Agricultural Activities**, or **Forest Management Practices** in the **Marsh Preserve**. **Grantor** shall not cut or otherwise take destructive action affecting **Significant Trees** in the **Marsh Preserve** without **Approval**. Notwithstanding the above, **Grantor** reserves the right to cut any tree, in accordance with applicable governmental laws and regulations, when it is necessary to salvage timber damaged by natural causes, when cutting is necessary to prevent further such damage or personal injury, or when a permitted structure is in danger. The **Marsh Preserve** shall be subject to the following additional restrictions:

(E) Industrial Uses. There shall be no industrial uses, activities, or structures on the **Protected Property**. No right of passage across or upon the **Protected Property** shall be allowed or granted if that right of passage is used in conjunction with any industrial uses or activities on the **Protected Property**.

(F) Commercial Uses. There shall be no commercial uses, activities or structures on the **Protected Property** without prior **Approval** by the **Grantee**. No right of passage across or upon the **Protected Property** shall be allowed or granted if that right of passage is used in conjunction with any commercial uses or activities not permitted in this Easement. For the purposes of this Easement, **Agricultural Activities**, **Forest Management Practices** and the leasing of hunting, trapping and fishing rights, and commercial, educational and land-leasing activity by a not-for-profit organization or governmental agency shall not be considered commercial uses.

(G) Educational and Recreational Uses. **Grantor** retains the right to engage in minimum impact educational and outdoor recreational activities including, but not limited to, hiking, wildlife observation, boating or other activities that do not impair the **Conservation Values** of the **Protected Property**.

(H) Services/Utilities. Construction of water wells, septic systems, and utility services, is limited to serve the allowed uses in Paragraph 4, subject to the Restrictions and Limitations of Paragraph 5, and subject to all applicable governmental laws and regulations. Existing utilities within the **Ashley River Buffer and Marsh Preserve** may be maintained, repaired, removed, or replaced at their current location as necessary. Fuel storage tanks are limited to aboveground or underground gaseous (not liquid) fuel storage tanks and/or aboveground liquid fuel storage tanks to serve the Reserved Rights outlined in Paragraph 4, subject to the Restrictions and Limitations of Paragraph 5, subject to all applicable governmental laws and regulations.

(I) Roads and Parking Areas. Roads and parking areas shall be limited to those required to facilitate the uses permitted by this Easement, provided there shall be no road constructed or covered with **Impervious Surface**. Maintenance of roads and roadside ditches shall be limited to standard practices for non-paved roads. Any road and/or parking area additions or improvements shall be subject to **Grantee Approval**.

(J) Landscaping. Landscaping shall be limited to the management of vegetation associated with the uses allowed by this Easement, including but not limited to, mowing, pruning, trimming, and gardening and any work permitted by the **Restoration Project**. Structural elements of landscaping, including but not limited to walkways and patios, shall be subject to **Impervious Surface** restrictions and limitations as outlined in this Easement.

(K) Lighting. There shall be no exterior lighting of which the light source is visible from off the **Protected Property** at ground level (except for an exterior light on the **Caretaker Residential Structure**); lights shall employ an opaque shield so as to prevent direct visibility of the light source from off the **Protected Property**. The purpose of this provision is to allow lighting on the **Protected Property** for safety and security and to minimize the impact of lighting on the relatively natural and scenic views of the **Protected Property**. No lighting shall be visible from the Ashley River or adjacent marshland.

(L) Signs. Signs visible from off of the **Protected Property** shall be limited to a maximum of eight (8) square feet in size, individually. Signs shall be placed so as to minimally impact the scenic view as seen from any public roadway or waterway.

(M) Archeological and Paleontological Excavations. **Grantor** may undertake or permit archeological or paleontological excavation on the **Protected Property** and shall give **Notice** to **Grantee** prior to commencing such activity. Any archeological or paleontological site shall, upon completion of any excavation, be returned to, or as close as possible to its previous state, unless the site is to be maintained in an excavated condition for interpretive purposes related to education. Any items found during archeological and paleontological excavations shall be the property of **Grantor**.

(N) Forestry Uses. A **Forest Management Plan** will be required for the **Protected Property** when deemed appropriate by the **Grantee**. Such **Forest Management Plan** may be solely for the **Protected Property** or may be included in other plans for **Drayton Hall**, such as a landscape plan or site master plan, at the sole discretion of **Grantor**. Forestry Uses are limited to those **Forest Management Practices** defined in the **Forest Management Plan**, or upon **Approval** from **Grantee**. **Grantor** shall provide **Notice** to **Grantee** of timber harvests. Notwithstanding the above, **Grantor** reserves the right to cut any tree, in accordance with applicable governmental

laws and regulations, when it is necessary to salvage timber damaged by natural causes, when cutting is necessary to prevent further such damage or personal injury, or when a permitted structure is in danger.

(O) **Significant Trees.** **Grantor** shall not cut or otherwise take destructive action affecting **Significant Trees** without **Approval**.

(P) **Agricultural Uses.** **Agricultural Activities** are restricted to the recommended or accepted practices, currently in use at the time of implementation, recommended by the South Carolina Cooperative Extension Service, the United States Natural Resources Conservation Service, their successors or other entities mutually acceptable to the **Grantor** and **Grantee**. **Grantor** and **Grantee** recognize that changes in agricultural technologies, including accepted management practices, may result in an evolution of **Agricultural Activities**. Such evolution shall be permitted so long as it is consistent with the **Purpose** described in Paragraph 1.

(Q) **Pond(s).** Enlargement of existing pond(s) and construction of new pond(s) shall be prohibited.

(R) **Impoundment(s).** **Grantor** is prohibited from creating, improving, repairing, replacing or maintaining new or existing and/or historic wetland impoundments, green tree reservoirs, dikes, ditches and water control structures. PROVIDED, HOWEVER, **Beazer** is permitted to conduct the **Restoration Project**.

(S) **Mining.** Mining and recovery of any oil, gas or minerals is prohibited on the **Protected Property**.

(T) **Topography and Hydrology.** **Grantor** shall not make adverse material alterations of the topography or hydrology, unless otherwise provided for in Paragraphs 4 or 5 or in the **Statement of Work**.

(U) **Leasing.** **Grantor** reserves the right to lease or grant other less-than-fee interests in all or a portion of the Protected Property for any use permitted to the **Grantor** under this Easement, provided that such lease or other interest is consistent with and subject to the terms of this Easement, and is not of a nature or terms as to constitute an impermissible **Subdivision** of the Protected Property. Leases with terms that exceed three (3) years shall be subject to **Notice** by **Grantor** to **Grantee**.

(V) **Refuse.** There shall be no placing of refuse on the **Protected Property** of vehicle bodies or parts, or refuse not generated on the **Protected Property**. Temporary piles for collection of refuse generated on the **Protected Property** established between regular removals are permitted provided such piles do not contain hazardous substances, pollutants, or wastes and do not impair the **Conservation Values** of the **Protected Property**. PROVIDED, HOWEVER, natural vegetation refuse is permitted on the **Protected Property**.

6. **Third Party Activities.** The **Grantor** shall keep the **Grantee** reasonably informed as to activities being conducted on the **Protected Property** which are within the scope of this Easement and as to the identity of any third parties who are conducting or managing such activities. The **Grantor** shall ensure that all third parties who are conducting activities relating to permitted uses of the **Protected Property** are fully and properly informed as to the restrictions and covenants contained within this Easement which relate to such uses, including without limitation, the provisions of this Paragraph and of Paragraphs 4 and 5.

7. **Grantee's Remedies.** If **Grantee** determines that **Grantor** is in violation of the terms of this Easement or that a violation is threatened, the **Grantee** shall notify the **Grantor** of the violation (hereinafter, "First Notice") and request voluntary compliance. In the event that voluntary compliance is not agreed upon within ninety (90) days of receipt of First Notice, the **Grantee** shall give written notice to **Grantor** of such violation (hereinafter, "Second Notice") and demand corrective action sufficient to cure the violation and, where the violation involves injury to the **Protected Property** resulting from any use or activity inconsistent with the Purpose, to restore the portion of the **Protected Property** so injured.

If **Grantor** fails to cure the violation within sixty (60) calendar days after receipt of Second Notice thereof from **Grantee** (or under circumstances where the violation cannot reasonably be cured within a sixty (60) calendar day period, if **Grantor** shall fail to begin curing such violation within said sixty (60) day period, or shall fail to continue diligently to cure such violation until finally cured), **Grantee** may bring an action at law or in equity in a

court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation ex parte as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement, including damages for the loss of the **Conservation Values**, and to require the restoration of the Protected Property to the condition that existed prior to any such injury. Without limiting **Grantor's** liability therefore, **Grantee**, in its sole discretion, may either apply any damages recovered to the cost of undertaking any corrective action on the **Protected Property** or may apply any damages recovered towards activities relating to monitoring and enforcing compliance with the terms of this Easement and other similar conservation easements.

If **Grantee**, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the **Conservation Values**, **Grantee** shall give immediate notice of the circumstances to **Grantor**, as described in Paragraph 21, and may immediately pursue its legal and equitable remedies under this Paragraph without waiting for the period provided for cure to expire. **Grantor** agrees that if such emergency arises, **Grantee** may obtain injunctive relief without the necessity of posting a bond.

Grantee's rights under this Paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement. **Grantor** agrees that if **Grantee's** remedies at law for any violation of the terms of this Easement are inadequate, the **Grantee** shall be entitled to seek the injunctive relief described in this Paragraph, both prohibitive and mandatory in addition to such other relief to which **Grantee** may be entitled, including specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies, and without the necessity of posting a bond. **Grantee's** remedies described in this Paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

8. Costs of Enforcement. If **Grantee** prevails in any action to enforce the terms of this Easement, any costs incurred by **Grantee** in enforcing the terms of this Easement against **Grantor**, including without limitation, costs of suit (which includes reasonable attorneys' fees), and any reasonable costs of restoration necessitated by **Grantor's** violation of the terms of this Easement, shall be borne by **Grantor**. If **Grantor** prevails in any action to enforce the terms of this Easement, any costs incurred by **Grantor**, including without limitation **Grantor's** cost of the suit (which includes reasonable attorneys' fees) shall be borne by **Grantee**.

9. Discretionary Consent. If, owing to unforeseen or changed circumstances, any of the uses or activities prohibited under this Easement are deemed desirable by both **Grantor** and **Grantee**, **Grantee** may, in its sole discretion, give **Approval** for such uses or activities, subject to such limitations as it deems necessary or desirable and provided that **Grantee** may give **Approval** only if **Grantee** determines that such activities (i) are consistent with the Purpose of this Easement, (ii) will not adversely affect the qualification of this Easement as a "qualified conservation contribution" under any applicable laws, including §§170(h) and 2031(c) of the Code or the Act, and (iii) will not adversely affect the "tax exempt" status of the **Grantee** under any applicable laws, including §501(c)(3) of the Code and Treasury Regulations promulgated thereunder. Furthermore, **Grantee** and **Grantor** have no right or power to agree to any use or activity that would result in the termination or extinguishment of this Easement.

10. Grantee's Discretion. Enforcement of the terms of this Easement shall be at the reasonable discretion of the **Grantee**, and any forbearance by **Grantee** to exercise its rights under this Easement in the event of any breach of any terms of this Easement by **Grantor** shall not be deemed or construed to be a waiver by **Grantee** of such term or of any subsequent breach of the same or any other term of this Easement or of any of **Grantee's** rights under this Easement. No delay or omission by **Grantee** in the exercise of any right or remedy upon any breach by **Grantor** shall impair such right or remedy or be construed as a waiver.

11. Grantor's Environmental Warranty. The **Grantor** warrants that **Grantor** has no actual knowledge of the existence or storage of hazardous substances, pollutants, or wastes on the **Protected Property** or a release or threatened release of hazardous substances, pollutants or wastes on the **Protected Property** excepting those required by the **Restoration Project**. **Grantor** promises to defend and indemnify the **Grantee** against all litigation, claims, demands, penalties, and damages, including reasonable attorney's fees, arising from breach of this warranty.

12. Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle **Grantee** to bring any action against **Grantor** for any injury to or change in the **Protected Property** resulting from

causes beyond **Grantor's** control, including, without limitation, trespass, fire, hurricane, flood, rising sea levels, climate change, storm and earth movement, or from any prudent action taken by **Grantor** under emergency conditions to prevent, abate or mitigate significant injury to the **Protected Property** resulting from such causes.

13. Access. **Grantor** and **Grantee** hereby provide the **Natural Resource Trustees**, or their designees, and **Beazer and its contractors or designees**, a right of access to the **Protected Property** to facilitate **Restoration Project** implementation and long-term monitoring of the **Restoration Project** until the **Natural Resource Trustees** issue the Certification of Completion of the **Restoration Project** required by Section 4.0 of the **Statement of Work**. Such access is subject to **Grantor's** right to restrict access to personnel who have signed a reasonable and appropriate release of liability and/or right of access indemnity agreement. Notwithstanding the foregoing, to the extent the **Natural Resource Trustees** is an agency of the State of South Carolina, or a party otherwise bound by and subject to the South Carolina Tort Claims Act, the **Natural Resource Trustees** shall not be subject to the indemnification obligations of this Paragraph 13. No right of public access to any portion of the **Protected Property** is conveyed by this Easement, except as expressly provided herein.

14. Costs, Liabilities, and Taxes. **Grantor** retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the **Protected Property**, including, but not limited to, clean up or remediation costs due to chemical contamination (excepting those associated with the **Restoration Project**) caused by **Grantor** and payment of taxes. Furthermore, if the **Grantor** maintains general liability insurance coverage for the **Protected Property**, **Grantor** will be responsible for such costs.

Each party agrees to release, hold harmless, defend and indemnify the other from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expenses and fees that the indemnified party may suffer or incur as a result of or arising out of wrongful or negligent activities of the indemnifying party on the **Protected Property**.

15. Transfer Fee. There shall be assessed by the **Grantee** a transfer fee equal to one (1) percent of the sales price and/or other consideration paid in connection with the transfer of any freehold or fee simple interest in the **Protected Property**, including but not limited to any conveyance by warranty deed, limited warranty deed, or quitclaim deed, sale, mortgage foreclosure, or conveyance in lieu of foreclosure. The transfer fee shall be paid to the **Grantee** on the date of the closing of the transfer.

Exemptions from assessment of transfer fee:

- (A) The sale of timber rights or products produced from permitted **Forest Management Practices** and/or permitted **Agricultural Activities** of such **Protected Property**.
- (B) Any transfer subsequent to the conveyance of this Easement:
 - I. Being the first transfer by the National Trust for Historic Preservation in the United States, the **Grantor** herein, or
 - II. Without consideration, or
 - III. To a spouse, a lineal descendant, an ancestor or ancestors, a spouse of a lineal descendent (collectively, "Immediate Family Members"), or
 - IV. To or from a trust whose beneficiaries or presumptive beneficiaries are the **Grantor** or an Immediate Family Member, or both, or
 - V. To an entity at least 50% of the equity interest of which is owned by **Grantor** or an Immediate Family Member, or
 - VI. If the **Grantor** of this Easement is a corporation, limited liability company or a partnership, to an owner/partner/member of such entity or to an Immediate Family Member thereof, or
 - VII. To a charitable organization which is tax exempt under §501(c)(3), or
 - VIII. Any transfer under a will, or
 - IX. Any transfer implemented or effected by court order, except foreclosure, or
 - X. Any transfer that corrects, modifies, or confirms a transfer previously made.

- (C) If a creditor purchases the **Protected Property** at a foreclosure sale or takes title to the Property in lieu of foreclosure, the transfer fee shall be due and paid at the time the creditor takes title. The transfer fee shall be based on the total bid for the **Protected Property** if purchased at a foreclosure sale or on the amount of the accrued indebtedness if the creditor accepts a deed in lieu of foreclosure. An additional transfer fee shall be due if the creditor who takes title through foreclosure or a deed in lieu of foreclosure sells the **Protected Property** for an amount higher than the amount subject to the transfer fee at the time the creditor took title; the additional transfer fee due shall be based on the additional amount alone, not the entire sales price. Creditor for purposes of this Paragraph shall include an assignee of the creditor who purchases the **Protected Property** at a foreclosure sale or takes a deed in lieu of foreclosure.

An exchange of properties pursuant to Code §1031, or similar statute, shall be deemed to be for consideration based on the market value of the property plus boot, if applicable, received at the time of such transfer. Market value of the **Protected Property** shall be determined by agreement of the **Grantor** and the **Grantee**, or in the absence of such agreement by a Member Appraisal Institute (MAI) appraiser selected by the **Grantee**, whose appraisal fee shall be paid by the **Grantee**.

Grantor grants **Grantee** a lien against the **Protected Property** for all or any part of the transfer fee that is unpaid at the time of the conveyance or assignment triggering the transfer fee. **Grantee**'s lien shall be subordinate to this Easement and to the lien of any first mortgage on the **Protected Property**. **Grantee** shall have the right to record a notice of lien for such unpaid transfer fee. Any such lien may be enforced and/or foreclosed in accordance with the laws of the State of South Carolina. **Grantee** may require the **Grantor** and/or any subsequent purchaser to provide reasonable written proof of the applicable sales price, such as executed closing statements, contracts of sale, copies of deeds or other such evidence.

16. Extinguishment, Condemnation and Fair Market Value.

- (A) Extinguishment. If circumstances arise in the future that render the Purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction. **Grantor** and **Grantee** also recognize that **Grantee** holds an interest in the **Protected Property** as reflected in this Easement, that this interest is a valuable property right, and that extinguishment would result in the elimination of that property right. Unless otherwise required by applicable law at the time, in the event of any subsequent sale of all or a portion of the **Protected Property** (or any other property received in connection with an exchange or involuntary conversation of the **Protected Property**) after such termination or extinguishment, and after the satisfaction of prior claims and any costs or expenses associated with such sale in accordance with their respective percentage interests in the fair market value of the **Protected Property**, as such interests are determined under the provisions of Paragraph 16(C), adjusted, if necessary, to reflect a partial termination or extinguishment of this Easement. All such proceeds received by **Grantee** shall be used by **Grantee** in a manner consistent with **Grantee**'s primary purposes. In the unlikely event of an extinguishment, the provisions of this paragraph shall survive extinguishment and shall constitute a lien on the **Protected Property** with the same effect and priority as a mechanic's lien, except that such lien shall not jeopardize the priority of any recorded lien of mortgage or deed of trust given in connection with a promissory note secured by the **Protected Property**.
- (B) Condemnation. If all or any part of the **Protected Property** is taken under the power of eminent domain by public, corporate, or other authority, or otherwise acquired by such authority through a purchase in lieu of a taking, **Grantor** and **Grantee** shall join in appropriate proceedings at the time of such taking to recover the full value of those interests in the **Protected Property** that are subject to the taking and all incidental and direct damages resulting from the taking. After the satisfaction of prior claims and net of expenses reasonably incurred by **Grantor** and **Grantee** in connection with such taking, **Grantor** and **Grantee** shall be respectively entitled to compensation from the balance of the recovered proceeds in conformity with the provisions of Paragraphs 16(A) and 16(C) unless otherwise provided by law. PROVIDED, HOWEVER, if all or a part of the **Marsh Preserve** is taken by

exercise of the power of eminent domain within twenty (20) years of the Effective Date, the **Natural Resource Trustees** shall be entitled to the compensation due to **Grantee** as provided in this Paragraph.

- (C) Percentage Interests. For purposes of allocating proceeds pursuant to Paragraphs 16(A) and 16(B), **Grantor** and **Grantee** stipulate that as of the date of this Easement, **Grantor** and **Grantee** are each vested with real property interests in the **Protected Property** and that such interests have a stipulated percentage interest in the fair market value of the **Protected Property**. **Grantor** and **Grantee** hereby agree that **Grantee's** percentage interest in the fair market value of the **Protected Property** is twenty percent (20%), unless the Court granting extinguishment determines, in the exercise of its discretion, a different percentage. For purposes of this paragraph, the ratio of the value of the Easement to the value of the **Protected Property** unencumbered by the Easement shall remain constant, and the percentage interests of **Grantor** and **Grantee** in the fair market value of the **Protected Property** thereby determinable shall remain constant, except that the value of any improvements made by **Grantor** after the effective date of this Easement is reserved to **Grantor**. The distribution of the percentage interest under this Paragraph shall only occur after the extinguishment of this Easement; no distribution of the percentage interests shall occur upon a subsequent resale of the **Protected Property** while the Easement is still valid and enforceable.

17. Limitations on Amendment. If unforeseen circumstances arise, including any change or modification to state or federal laws or regulations especially as they relate to the Code, under which an amendment to, or modification of, this Easement would be appropriate to clarify any ambiguities or to maintain or enhance the **Conservation Values**, **Grantor** and **Grantee** may, by mutual written agreement, jointly amend this Easement; provided that no amendment shall be allowed that will adversely affect the eligibility of this Easement as a "qualified conservation easement" or "qualified conservation contribution" under any applicable laws, including §§170(h) and 2031(c) of the Code. No amendment shall be allowed which would adversely affect the "tax exempt" status of the **Grantee** under any applicable laws, including §501(c)(3) of the Code and Treasury Regulations promulgated thereunder. Any such amendment shall be consistent with the Purpose of this Easement, shall not affect its perpetual duration, shall not permit additional development or improvements that would interfere with the **Restoration Project** or the essential scenic quality of the land or with any governmental conservation policy that is being furthered by this Easement donation and as stated in §1.170A-14(d)(4)(v) of the Treasury Regulations, shall not permit any impairment of the **Conservation Values**. **Grantor** and **Grantee** agree to reasonable consideration of any such proposed amendment, however, neither **Grantor** nor **Grantee** shall be bound to agree to any amendment. Any such amendment shall be recorded in the official land records of Charleston County, South Carolina.

18. Assignment. This Easement shall not be assignable by the **Grantee**, except if as a condition of any assignment, (i) the **Grantee** requires that the terms and conditions of this Easement continue to be carried out in full as provided herein, (ii) the assignee has a commitment to protect the Purpose and the resources to enforce the restrictions contained herein, and (iii) if the assignee, at the time of assignment, qualifies under §170(h) of the Code, and applicable Treasury Regulations promulgated thereunder, and under State of South Carolina law as an eligible donee to receive this Easement directly. Any assignment shall be in accordance with the **Grantee's** Policy on Assigning or Becoming a Secondary Conservation Easement Holder and Accepting Transfers or Transferring Conservation Easements on file with the **Grantee**. In the event that **Grantee** ceases to exist or exists but no longer as a tax-exempt, nonprofit corporation, qualified under §§501(c)(3) and 170(h)(3) and not a private foundation under §509(a) of the Code, then this Easement shall be assigned to a tax-exempt, nonprofit organization, qualified under §§501(c)(3) and 170(h)(3) and not a private foundation under §509(a) of the Code, which has a mission of protecting open lands or natural resources in the South Carolina Lowcountry.

19. No Extinguishment Through Merger. **Grantor** and **Grantee** herein agree that should **Grantee** come to own all or a portion of the fee interest in the Protected Property, (i) **Grantee** as successor in title to **Grantor** shall observe and be bound by the obligations of **Grantor** and the restrictions imposed upon the Protected Property by this Easement; (ii) this Easement shall not be extinguished, in whole or in part, through the doctrine of merger in view of the public interest in its enforcement; and (iii) **Grantee** as promptly as practicable shall assign the **Grantee** interests in this Easement of record to another holder in conformity with the requirements of this Paragraph 19. Any instrument of assignment of this Easement or the rights conveyed herein shall refer to the provisions of this

Paragraph 19, and shall contain language necessary to continue it in force. Further, no deed, transfer, or assignment shall be effective if it will result in merger, until a like conservation easement has been granted to avoid merger.

20. Transfers. **Grantor** agrees to incorporate by reference the terms of this Easement in any deed or other legal instrument by which **Grantor** transfers any interest in all or a portion of the **Protected Property**, including, without limitation, a leasehold interest. The **Grantor** shall give the **Grantee Notice** of any change of ownership of the **Protected Property** within thirty (30) days of such change. The failure of **Grantor** to perform any act required by this Paragraph shall not impair the validity of this Easement or limit its enforceability in any way.

21. Communication. All **Requests for Approvals** shall be in writing and shall be deemed sufficiently given or rendered only when acknowledged in writing by **Grantee**. All **Notices** and other communications to **Grantee** may be communicated by United States Postal Service first class mail, hand courier, electronic mail or facsimile, and shall be deemed sufficiently given or rendered and effective only when acknowledged in writing by **Grantee**. All such correspondence and communications shall be addressed as follows:

If to **Grantor**: National Trust for Historic Preservation
Drayton Hall
3380 Ashley River Road
Charleston, SC 29414
Attn: Executive Director

With a copy to **Grantor**'s Attorney: National Trust for Historic Preservation
The Watergate Office Building
2600 Virginia Avenue, NW, Suite 1100
Washington, DC 20037
Attn: Law Division

If to **Grantee**: Lowcountry Land Trust, Inc.
43 Wentworth Street
Charleston, SC 29401
Attn: President & CEO

or to such other person or place as such recipients may designate by correspondence as aforesaid. Correspondence by mail or overnight courier service shall be deemed given on the date of receipt as shown on the return receipt, or receipt or records of the courier service, as the case may be. In the event any such correspondence is mailed via the United States Postal Service or shipped by overnight delivery service to a party in accordance with this Paragraph and is returned to the sender as undeliverable, then such correspondence shall be deemed to have been delivered or received on the third day following the deposit of such correspondence in the United States Mail or the delivery of such correspondence to the overnight delivery service. **Grantor** has the responsibility of promptly notifying **Grantee** of **Grantor**'s current address and other contact information. **Grantor** shall promptly notify **Grantee** of (i) any changes of **Grantor**'s address or other changes in **Grantor**'s contact information, and (ii) the name, address, and contact information of any transferee of the Protected Property if **Grantor** conveys the Protected Property. Any communications or Correspondence by **Grantee** to or with **Grantor** sent to the last address provided by **Grantor** shall be deemed sufficient to provide notice to **Grantor**. For a period of 20 years after the date of this Easement, copies of correspondence and communication required under Paragraph 21 and made pursuant to this Paragraph 21, except for routine correspondence between **Grantee** and **Grantor** that has no bearing on the **Restoration Project**, shall be contemporaneously provided to:

NOAA Restoration Center
c/o NOAA Office for Coastal Management
2234 S. Hobson Avenue
Charleston, SC 29405

22. Recordation. **Grantor** or **Grantee** shall record this instrument in timely fashion in the Register of Mesne Conveyance (“RMC”) Office for Charleston County, South Carolina, and may re-record it at any time as may be required to preserve its rights in this Easement.
23. Effective Date. **Grantor** and **Grantee** agree that the restrictions arising hereunder take effect on the day this Easement is recorded in the RMC Office for Charleston County, South Carolina, after all required signatures have been affixed hereto, and that such recording shall take place no later than 60 days following entry of the Consent Decree between **Beazer** and the **Natural Resource Trustees**.
24. Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of South Carolina.
25. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of this Easement to uphold the Purpose as stated in Paragraph 1. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the Purpose that would render the provision valid should be favored over any interpretation that would render it invalid.
26. Severability. If any provision of this Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Easement shall not be affected thereby.
27. Entire Agreement. The covenants, terms, conditions and restrictions of this Easement shall be binding upon, and inure to, the benefit of the parties hereto and their respective personal representatives, heirs, successors and assigns and shall continue as a servitude running in perpetuity with the **Protected Property**. All terms used in this Easement, regardless of the number or gender in which they are used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine, or neuter, as the context or sense of this Easement, any Paragraph, Subparagraph, or clause herein may require as if such terms had been fully and properly written in such number or gender.

TO HAVE AND TO HOLD the Easement interests herein described unto **Grantee** forever.

By execution of this Easement, the **Grantee** accepts this Easement and the rights and obligations recited herein.

GRANTOR HEREBY WARRANTS and represents that the **Grantor** is seized of the **Protected Property** in fee simple and has the right to grant and convey this Easement, that the **Protected Property** is free and clear of any and all encumbrances, except existing easements of record and prescriptive easements, if any, and that the **Grantee** shall have the use of and enjoy all of the benefits derived from and arising out of this Easement.

IN WITNESS WHEREOF, **Grantor** and **Grantee** have set their hands to duplicate original copies of this Easement under seal on the day and year first above written.

THE REST OF THIS PAGE INTENTIONALLY LEFT BLANK.

WITNESSES:

GRANTOR:

National Trust for Historic Preservation in the United States

By: _____

Its: _____

DISTRICT OF COLUMBIA)
)
CITY OF WASHINGTON)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged this ____ day of _____, 2018, before me the undersigned Notary, and I do hereby certify that the above named **Grantor** personally appeared before me and acknowledged the due execution of the foregoing instrument.

(Signature of Notary)
Notary Public
My commission expires: _____

WITNESSES:

GRANTEE:

LOWCOUNTRY LAND TRUST, INC.

By: _____

Its: _____

And: _____

Its: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged this ____ day of _____, 2018, before me the undersigned Notary, and I do hereby certify that the above named duly authorized officers of the **Grantee** personally appeared before me and acknowledged the due execution of the foregoing instrument.

(Signature of Notary)
Notary Public for the State of South Carolina
My commission expires: _____

EXHIBIT A

Legal Description and Derivation of Protected Property

(TO BE PROVIDED BY **GRANTOR**)

TMS #(s) 406-00-00-011, 406-00-00-039, 406-00-00-040

Grantee's Address: 43 Wentworth Street
Charleston, SC 29401

EXHIBIT B

Aerial Map Showing **Marsh Preserve** and **Ashley River Buffer**

(TO BE PROVIDED BY GRANTEE)

EXHIBIT C

[Statement of Work]

(TO BE PROVIDED BY TRUSTEES)

EXHIBIT A

Legal Description and Derivation of Protected Property

(TO BE PROVIDED BY **GRANTOR**)

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Aerial Map Showing **Marsh Preserve** and **Ashley River Buffer**

(TO BE PROVIDED BY GRANTEE)

EXHIBIT C

[Statement of Work]

(TO BE PROVIDED BY TRUSTEES)

U.S. et al. v. Beazer East, Inc.
Consent Decree Appendix C
Addresses for Notice Pursuant to Section XVII (Notice)

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Re: DJ # 90-11-2-08343

As to NOAA:

Corinna McMackin
Attorney-Advisor
NOAA Office of General Counsel
55 Great Republic Drive
Gloucester, MA 01930
(978) 281-9231

Howard Schnabolk
NOAA Restoration Center
2234 South Hobson Avenue
Charleston, SC 29405-2413
843-740-1328
843-740-1315 (fax)

As to DOI/FWS:

Brigitte Beaton
Attorney Advisor
U.S. Department of the Interior
Office of Regional Solicitor
75 Ted Turner Drive, S.W., Suite 304
Atlanta, GA 30303
(404) 331-5611

As to SCDHEC:

Susan Lake
Chief Counsel for Compliance and
Environmental Health Services
SCDHEC Office of General Counsel

2600 Bull St.
Columbia, SC 29201
(803) 898-3570
(803) 898-3367 (fax)

As to SCDNR:

Shannon Bobertz, Esq.
Chief Counsel
SC Department of Natural Resources
P. O. Box 167
Columbia, SC 29202
(803) 734-4006
(803) 734-3911 (fax)

As to Beazer East, Inc.:

Charles E. McChesney II, Esq.
Beazer East, Inc.
c/o Three Rivers Management, Inc.
600 River Ave., Suite 200
Pittsburgh, PA 15212
(412) 208-8839
(412) 208-8803 (fax)